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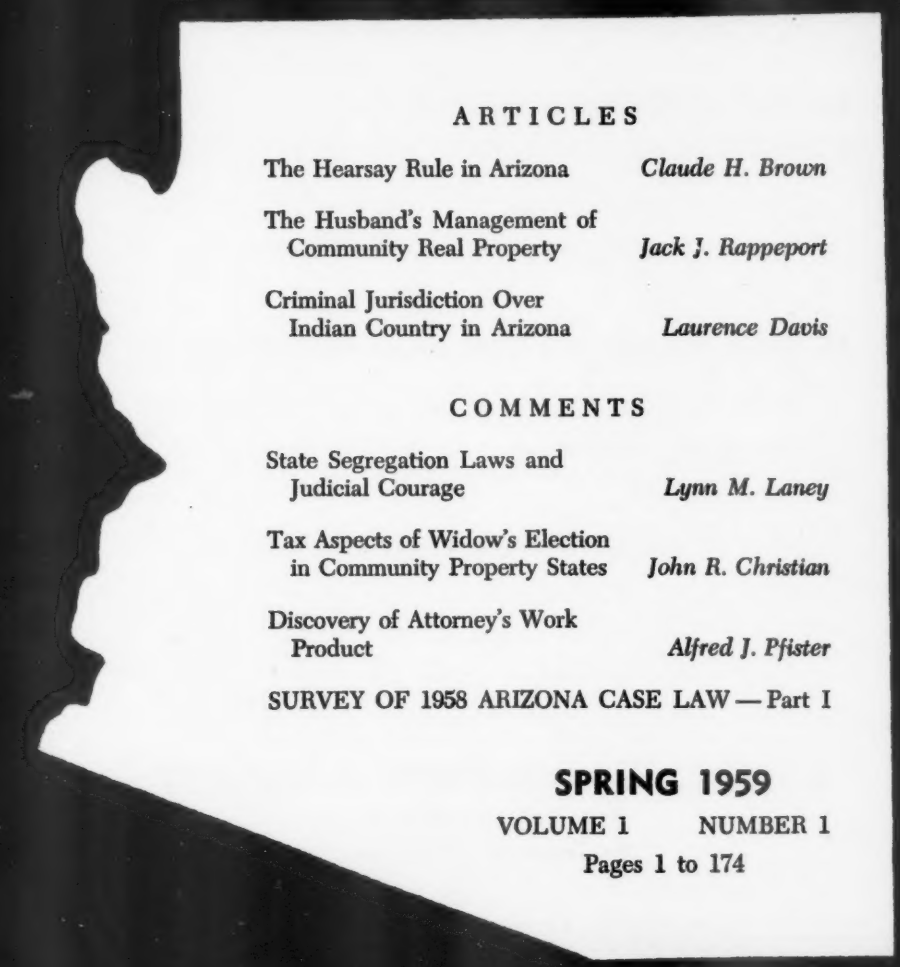

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The Hearsay Rule in Arizona

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I. *What Is Hearsay?*

This article deals mainly with the problem of determining what is hearsay, with special emphasis upon Arizona cases, statutes and court rules; it will not concern the many exceptions to the hearsay rule. Dean Wigmore's definition is in substance that hearsay is a statement, oral or written, made at a time when there was no opportunity to cross-examine the declarant and offered to prove the truth of the words spoken or written.[1]

Professor McCormick's recent textbook proposes a slightly different definition: "Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."[2] It appears that the only difference in these two definitions involves the question whether depositions and prior testimony are to be treated as an exception to the hearsay rule, or as satisfying the requirements of the rule and therefore not hearsay. That question is considered in Part III of this article. Under the definitions of both Wigmore and McCormick an act or conduct implying a statement or opinion can be hearsay.[3]

* See Contributors' Section, p. 117, for biographical data.

[1] 5 WIGMORE, EVIDENCE §§ 1361, 1362 (3d ed. 1940); 6 *id.*, § 1766.

[2] MCCORMICK, EVIDENCE 460 (1954).

[3] Concerning conduct as hearsay, see MCCORMICK, *id.*, § 229. The leading case is Wright v. Doe d. Tatham, 7 Ad. & El. 313, 112 Eng. Rep. 488 (Exch. Ch.1837). To prove sanity of testator when the will was executed there were offered business and social letters to testator of a type which would not be written to a person regarded as insane. The letters were excluded: "Those letters may be considered in this respect to be on the same footing as if they had contained a direct and positive statement

Usually either the Wigmore or McCormick definition affords easy recognition of hearsay. A few Arizona cases as examples will suffice. In an election contest involving acts of A in fraudulently changing ballots a witness testified that B told him that B had changed only one ballot but that A had changed several ballots.[4] In a forcible entry and detainer action by a corporation, defendant claimed that he purchased the property from X, an employee of plaintiff; defendant testified that X told him that the superintendent of the corporation had made X a present of all the improvements.[5] Mercantile reports concerning a party to the litigation[6] and a copy of a certificate of discharge from the army, stating the reason for discharge, have been held to be hearsay when offered to prove the truth of the contents of the writings.[7] Expert opinion is held inadmissible if based even in part on hearsay statements.[8]

A recent Arizona case, *State v. Coey*, thoroughly considered the meaning of hearsay and in substance states with approval the Wigmorean definition of hearsay.[9] In a first-degree murder trial the county attorney said in his opening statement that the evidence would show that deceased's son "was dispatched to procure a soft drink so that this incident (killing) could occur in privacy." A deputy sheriff testified concerning a conversation he had with defendant subsequent to the killing: "I told him we had talked to the little boy and the little boy was positive that he didn't ask his father (defendant) for the money but that his father gave him the quarter and told him to go to the store and get the Coca-Cola." The state contended the testimony was not hearsay because "it was admitted on the theory that it was not intended to prove the substance of what the boy had said, but merely to show a conversation between the witness and the defendant." The answer to such contention is that the only relevancy of the conversation is the truth of what the boy said. The contention is an example of a vagarious localism,

that he was competent. For this purpose they are mere hearsay evidence . . . of the matter in question, with this addition, that they have acted upon the statements on the faith of their being true, by sending the letters to the testator. That the so acting cannot give a sanction for the truth of the statement is perfectly plain; for it is clear that, if the same statements had been made . . . to a third person, that would have been insufficient. . . . If a wager to a large amount had been made as to the matter in issue by two third persons, the payment of that wager . . . would not be admissable to prove the truth of the matter in issue."

[4] Hunt v. Campbell, 19 Ariz. 254, 169 Pac. 596 (1917).

[5] Willows Cattle Co. v. Connell, 25 Ariz. 592, 220 Pac. 1082 (1923).

[6] Young's Market Co. v. Laue, 60 Ariz. 512, 141 P.2d 522 (1943).

[7] Douglass v. State, 44 Ariz. 84, 33 P.2d 985 (1934).

[8] Security Benefit Assoc. v. Small, 34 Ariz. 458, 272 Pac. 647 (1928); Middleton v. Green, 35 Ariz. 205, 276 Pac. 322 (1929).

[9] 82 Ariz. 133, 309 P.2d 260 (1957). Although the discussion is dicta in that the Court affirmed notwithstanding erroneous admission of hearsay evidence because there was no prejudice in view of the entire record, the problem of what constitutes hearsay was considered at some length. 82 Ariz. at 139-141, 309 P.2d at 264-265.

"was-defendant-present?" test of hearsay.[10] The court disposed of this argument concerning the nature of hearsay in the following statement:

> As a general proposition, where an extrajudicial statement made by a person is introduced to prove the truth of the words spoken, and where there was no opportunity to cross-examine the declarant, as here, the statement constitutes hearsay . . . and is inadmissible unless it qualifies as an exception.
>
> We fail to perceive how the mere fact that the above witness and the defendant engaged in conversation was material to any issue in this case; it was the substance and not the fact of the conversation which had materiality. Therefore, the statements made by the boy could only pass the test of materiality if they were introduced to prove the truth of what he said, namely, that he did not ask to go to the store at a time just prior to the killing but that the defendant had in fact dispatched him to the store. Since there was no opportunity to cross-examine the declarant (boy) at the time the statement was made, and since the testimony fails to qualify as an exception, the evidence comes within the rule above set forth, and its admission, therefore, was error.[11]

Even though the witness is also the declarant and there is now an opportunity to cross-examine him as a witness, his declaration out of court is hearsay.[12] Since the requirement of opportunity to cross-examine is necessary for the purpose of testing the trustworthiness of the declarant's statements, with reference to his perception, memory, bias and interest, as well as the observation of his demeanor and need for the wit-

[10] Perhaps the origin of this idea is to be found in cases in which statements could not possibly have been "binding" upon a party either because not made by an agent within his authority or because not within the doctrine of admission by silence, and the Court merely points out that the statements were not adopted by the party by stating only that he was not present. Crowell v. State, 15 Ariz. 66 at 67, 136 Pac. 279 at 283 (1913); Ives v. Lessing, 19 Ariz. 208, 168 Pac. 506 (1917). Occasionally a court goes even further and applies a vague notion about "proof-only-of-what-was said" as not being hearsay. E.g., Fred Harvey Corp. v. Mateas, 170 F.2d 612 (9th Cir. 1948), involved injuries sustained when plaintiff allegedly was thrown from a mule, Chiggers, on a trip into Grand Canyon. A dictum says it was not error to admit conversation among the group about Chiggers' antics before plaintiff fell, even though defendant's guide was not present (if present it would have the non-hearsay purpose of giving knowledge of bucking propensity). The Court said, "Upon admitting the conversations for a limited purpose, the court informed the jury that the conversations were not to be considered as proof that anything which the conversations may have alluded to was a fact, but as proof only of what was said." But what relevancy do they have, if the guide was not present to receive notice of the mule's conduct, except to prove truth of the conversations, viz., that Chiggers was bucking?

[11] State v. Coey, 82 Ariz. at 141, 309 P.2d at 265.

[12] State v. Lane, 72 Ariz. 220, 226-227, 233 P.2d 437, 441 (1951) (dictum).

ness' oath,[13] Arizona has held that the trial court cannot admit hearsay to relieve a harsh situation.[14]

II. *Hearsay Rule Inapplicable*

There are of course out-of-court statements which are admissible because they are not offered for the purpose of proving the facts asserted in them; hence their value does not depend upon the veracity of the declarant. They are not hearsay exceptions; the hearsay rule is inapplicable to them because they are not offered to prove the truth of the contents of the statements.[15] In general, they may be classified into four groups.

A. Self-contradictory (Inconsistent) Statements

Inconsistent or self-contradictory statements of a non-party witness are not admitted as substantive proof of the facts contained in the statement but only for the purpose of impeachment, that is, to neutralize his testimony.[16] Of course if the statement is made by a party-opponent it can be used substantively as an admission (hearsay exception) as well as for impeachment.[17] It may be oral or written.[18]

B. Words the Facts in Issue

When the statements are the subject of inquiry, that is, the operative facts constituting the basis of the claim, it is obvious that they are not hearsay.[19] Thus, in proving an alleged oral contract, the offer and acceptance are the facts in issue and are not offered to prove the truth of anything said. The same is true of a written contract in issue. The same principle applies to defamation, perjury and lost will cases. Indeed, in the defamation and perjury cases after plaintiff proves that the words were spoken he hopes to establish that they are false.

[13] 5 WIGMORE, EVIDENCE § 1362 (3d ed. 1940); MCCORMICK, EVIDENCE § 224 (1954).

[14] Inspiration Consol. Copper Co. v. Bryan, 31 Ariz. 302, 252 Pac. 1012 (1927).

[15] 6 WIGMORE, EVIDENCE § 1770 (3d ed. 1940); MCCORMICK, EVIDENCE § 228 (1954).

[16] Shaffer v. Territory, 14 Ariz. 329, 127 Pac. 746 (1912); Otero v. Soto, 34 Ariz. 87, 267 Pac. 947 (1928); Brooks v. Neer, 46 Ariz. 144, 47 P.2d 452 (1935); State v. Lane, 69 Ariz. 236, 211 P.2d 821 (1949). *Cf.* Rowe v. Goldberg Film Delivery Lines, Inc., 50 Ariz. 349, 354-355, 72 P.2d 432, 435 (1937), stating that trier of fact may "accept either statement which it wishes as true, or, on account of the discrepancy, may disregard the testimony of the witness entirely." But that case involved self-contradictory statements of a party, admissible substantively as an admission as well as for impeachment purposes; as an admission of a party-opponent it is a hearsay exception.

[17] Rowe v. Goldberg Film Delivery Lines, Inc., *supra* note 16, People v. Southack, 39 Cal. 2d 578, 248 P.2d 12 (1952).

[18] Tamborino v. Territory, 7 Ariz. 246, 64 Pac. 492 (1901); Shaffer v. Territory, 14 Ariz. 329, 127 Pac. 746 (1912); Buehman v. Smelker, 50 Ariz. 18, 68 P.2d 946 (1937) (prior pleading, though superseded); Posner v. N. Y. Life Ins. Co., 56 Ariz. 202, 106 P.2d 488 (1940).

[19] 6 WIGMORE, EVIDENCE § 1770 (3d ed.); MCCORMICK, EVIDENCE 463-464 (1954); Hartford v. Faw, 166 Wash. 335, 7 P.2d 4 (1932).

C. Verbal Acts Part of Conduct in Issue

Words which are part of the conduct in issue(verbal acts) are not hearsay because they are not offered to prove the truth of the facts stated.

Suppose defendant was indebted to plaintiff both on an open account and on a promissory note; plaintiff sues defendant on the note; and defendant pleads payment of the note. Defendant's witness testifies that he saw defendant hand plaintiff money and heard defendant say to plaintiff, "Apply this money on the note, not on the open account." Payment is the issue—the physical act of handing over the money coupled with the verbal act of giving directions upon which debt to make application of the money constitute the conduct in issue.

A Minnesota case furnishes a good example.[20] Plaintiff leased land to a tenant, the lardlord to receive two-fifths of the corn. When the tenant was about through husking he pointed to two cribs of corn and said to plaintiff, "Here is your corn; this belongs to you, Mr. Hanson." Previously the tenant had mortgaged his interest in the corn to a bank. After the husking and the tenant's conversation with the lessor, the bank sold the corn, including that in the two cribs. The lessor sued the bank for conversion. The words of the tenant were part of the conduct of landlord and tenant in creating separate ownership in property which formerly was owned as tenants in common. So it was held that the words were not hearsay.

This principle has been applied in Arizona. In an action by a bank on promissory notes defendant contended that the bank was negligent in disposing of cotton which was pledged as security for the notes. Plaintiff offered evidence of orders and directions to the bailee of the cotton. Defendant objected that such evidence was hearsay and self-serving. The evidence was held admissible and not hearsay. The Court said the orders and directions of plaintiff to the bailee were verbal acts bearing on the issue of negligence.[21] Incidentally, it should be noted that the Court correctly held that the fact that the evidence is "self-serving" is not a good objection if it is otherwise admissible.[22] The objection that a question calls for self-serving declarations of a party does not add anything to the objection that it calls for hearsay; they are "merely hearsay with a vituperative epithet."[23]

[20] Hanson v. Johnson, 161 Minn. 229, 201 N.W. 322 (1924).

[21] Pawley v. First Nat. Bank, 32 Ariz. 135, 256 Pac. 507 (1927).

[22] *Accord*, Richfield Oil Co. v. Estes, 55 Ariz. 81, 98 P.2d 851 (1940). *Cf.* Ives v. Lessing, 19 Ariz. 208, 210, 168 Pac. 506 (1917) (after holding testimony hearsay the Court said, "It is also self-serving, and for that reason was properly rejected.")

[23] Dean Hardman, *Hearsay: "Self-serving" Declarations,* 52 W. VA. L.R. 81 (1950); MCCORMICK, EVIDENCE 588 (3ed ed. 1954):

> The doctrine that a party's out-of-court declarations or statements cannot be

In another Arizona case applying the "verbal act" principle it was material to show that defendant received notice of a transaction between X and plaintiff. Defendant's clerk testified that he received a communication from X concerning the transaction. It was held admissible to prove notice was received by defendant but not to prove what the transaction was.[24]

D. Words as Circumstantial Evidence of a State of Mind

In a criminal case in which insanity is the defense it is quite obvious that if defendant's witness testified that shortly before the act defendant said, "I am Napoleon," this would not be hearsay because it is not offered to prove the truth of the statement but as circumstantial evidence of his mental condition. If an utterance or writing is offered to prove a state of mind or quality of conduct (knowledge, belief, good faith, reasonableness, diligence, motive, etc.) of a person, and is not offered to prove the truth of the words spoken or written, it is not hearsay but is circumstantial evidence of the state of mind or quality of conduct.[25] This principle must be distinguished from the hearsay exception for words *expressing* a state of mind.[26]

The words need not be spoken or written by the person whose state of mind is involved; they may be spoken or written to him and offered to show the effect on the mind of the hearer or reader. Under a statute prohibiting carrying concealed weapons unless one has good reason to apprehend a serious attack, a witness testified for defendant that X told the witness that Y had threatened to kill defendant and that the witness then told defendant that Y had threatened defendant. This evidence was admissible, not to prove that Y made the threats, but to prove defendant's state of mind.[27]

evidence in his favor, because "self-serving," seems to have originated as a counter-part and accompaniment of the rule, now universally discarded, forbidding parties to testify. When this latter rule of disqualification for interest was abrogated by statute, the accompanying rule against "self-serving" declarations should have been regarded as abolished by implication. Unfortunately it has lingered in the language of many opinions as a sweeping rule of exclusion.

Actually the appropriate rule for the exclusion of a party's declaration offered in his own behalf as evidence of the truth of the facts declared is the hearsay rule. Correspondingly, when such declarations fall within the exceptions to the hearsay rule, which are designed to admit hearsay statements when specially needed and unusually trustworthy, they should be admitted though made by a party and offered in his behalf.

[24] Carrillo v. Murray & Layne Co., 25 Ariz. 303, 216 Pac. 689 (1923).

[25] 6 WIGMORE, EVIDENCE §§ 1789, 1790 (3d ed. 1940); McCormick on Evidence 464-465 (1954).

[26] McCORMICK, *id.* §§ 268-270.

[27] Hurst v. State, 101 Miss. 402, 58 So. 206 (1912), approved in 6 WIGMORE, EVIDENCE § 1789 (3d ed. 1940); People v. Jones, 293 Mich. 409, 292 N.W. 350 (1940) (detectives tried for assault on R; letter admissible accusing defendants of extortion written by R and shown to defendants before assault;". . . not objectionable as hearsay because it was not offered to establish the substantive truth of its con-

In an Arizona case the defense to a lessee's action for breach of a lease was that plaintiff consented to its termination. To rebut that contention plaintiff offered his letter written a few days after eviction stating that thirty days notice of termination was not given and hence plainiff was entitled to damages. The letter was held admissible as circumstantial evidence of his state of mind close to the time of eviction.[28]

Although the admissibility was not questioned on appeal in another Arizona case it is believed that a similar analysis applies.[29] A horseman sued the owner of the horse and his agent to recover damages for personal injuries allegedly sustained when the horse reared up and fell on the rider. Plaintiff offered evidence of the statement of the agent that the horse had thrown a rider before this event. As against the agent who was a defendant this is a hearsay exception, admission of a party-opponent; but as against the employer the Court seems to have had in mind the "circumstantial evidence of a state of mind" principle as indicated by the following language: "It is also the law that knowledge of the agent or servant of the vicious tendencies of the animal is imputable to the principal if the care or control of the animal is within the scope of the agent's employment. . . . It was admissible against appellee upon the ground that it was a statement or declaration of its agent before the accident occurred, about the conduct of a horse the control of which fell within the scope of his employment. . . ."

III. *Prior Testimony*

Evidence may be received in a pending case in the form of a written transcript or an oral report of a witness's former testimony under requirements adopted to afford an adequate opportunity of cross-examination. There is sharp disagreement concerning what those requirements are and should be. The offered evidence may have been given by deposition or at a trial either in a separate case or in a prior hearing in the pending action.

The classification of prior testimony as an exception to the hearsay rule, on the one hand, or as a satisfaction of the requirements of that rule, on the other hand, should depend upon the definition of hearsay. Since the definition generally stated by the courts includes the lack of opportunity to cross-examine the declarant when the words were spoken,

tents, but to show that defendants knew that Roberson made the accusations. From this the jury was asked to infer a motive of retaliation."); Crespin v. Albuquerque Gas & E. Co., 39 N.M. 473, 50 P.2d 259 (1935) (personal injury action; shock when plaintiff picked up live wire; plaintiff's evidence that fellow employee told him current was off, held not hearsay — shows listener's state of mind bearing on reasonableness of his conduct).

[28] Richfield Oil Co. v. Estes, 55 Ariz. 81, 98 P.2d 851 (1940).

[29] Walters v. Southern Ariz. School for Boys, 77 Ariz. 141, 267 P.2d 1076 (1954).

logically prior testimony should be considered as a satisfaction of the hearsay rule requirements and not as an exception, because an opportunity to cross-examine is insisted upon as a condition of admission of prior testimony. Especially does this classification seem correct when a deposition or prior testimony in the same action between the same parties is involved. When equity cases were tried entirely on depositions it probably was not considered that the entire trial was based on hearsay.[30] But the courts and textwriters now disagree on such classification. Wigmore takes the view that the testimony satisfies the hearsay rule.[31] McCormick takes the opposite view "by adopting a definition of hearsay which would include all testimony given by deposition or at a previous trial or hearing, in the present or another litigation, provided it is now offered as evidence of the facts testified to. Only given orally at the present trial or hearing, and subject to cross-examination, would when offered to prove the facts recited escape the name of hearsay."[32] He considers the classification as an exception of some importance because "it probably facilitates the wider admission of former testimony, which is generally of a relatively high degree of trustworthiness, under a liberalized exception."[33]

The large majority of cases have held that not only must the prior testimony be offered on the same issue, and against a party, or privy, who was also a party to the prior action with opportunity to cross-examine, but the parties on *both* sides must be the same or be in privity with a prior party, who must have been the dominant party in the sense of successive relationships to the same rights of property. A leading case supporting this strict majority view is *Metropolitan Street Railway Co. v. Gumby*.[34] A mother sued for the loss of services of an infant son in a negligence action. In a prior case the son had sued by his grandmother as guardian ad litem to recover for pain and suffering and disability caused by the same accident. The testimony of a deceased witness at the first trial was offered by the plaintiff in the second trial. Notwithstanding the testimony was offered against the same defendant and the mother would have no cause of action unless the son had a cause of action, the testimony was held inadmissible. The court said:

> Manifestly, no such mutual or successive relationship exists between the infant, claiming damages for his pain and suffering,

[30] Prior to Federal Equity Rules of 1912 "testimony by deposition in suits in equity was the standard and usual method of evidence in the federal courts." DOBIE, FEDERAL PROCEDURE 716 (1928); MOORE, FEDERAL PRACTICE par. 26.03(2) (2d ed. 1950).

[31] 5 WIGMORE, EVIDENCE § 1370 (3d ed. 1940).

[32] MCCORMICK, EVIDENCE 480 (1954).

[33] *Id.* at 481. The Uniform Rules of Evidence, proposed by the Commissioners on Uniform State Laws, Rule 63(3) considers prior testimony an exception to the rule against hearsay.

[34] 99 Fed. 192 (2d Cir. 1900).

> and his mother, claiming damages for the loss of his services. The causes of action are distinct, and neither claimant could under any circumstances succeed to the other's cause of action. . . .
>
> It should further be noted that testimony of a witness on a former trial cannot be admitted against one of the parties to a subsequent trial unless it could be admitted against the other.[35]

The *Gumby* case, requiring the property test of privity as well as mutuality or reciprocity to be satisfied, even though there was the same opportunity and motive for cross-examination of the witness by the same defendant in both actions, was applied in *United States v. Aluminum Company of America*.[36] The government offered testimony of a deceased witness on the same issue in a prior action by the Federal Trade Commission against the same defendant; it was inadmissible because the United States was the dominant party, so there was no privity and no "reciprocal right in the other party to introduce it."

A striking case of this strict view is an Illinois decision which held inadmissible, in an action to recover for loss under a fire insurance policy, the testimony of the state's witness in a prior trial of plaintiff for feloniously burning the property with intent to defraud the insurance company, the witness having been shot and killed by plaintiff.[37]

A minority of courts have abandoned the requirement of privity and reciprocity if the party *against* whom the testimony is offered was a party in the former action, so that there is present the opportunity of that party to cross-examine. Thus, the deposition of an employee who sued under the Federal Employers' Liability Act was held admissible after his death when his executor was substituted as plaintiff for recovery of damages for wrongful death on behalf of his widow.[38] It has been held by the Court of Appeals, Tenth Circuit, that depositions taken in a prior action for infringement of a patent were admissible against the same plaintiff in a subsequent action against other defendants for infringement of the same patent.[39]

A few cases have gone further in admitting former testimony. For example, in a Missouri case a wife sued for her personal injuries in alighting from a bus.[40] In a prior case her husband sued for loss of services of the wife from the same accident. Defendant was allowed to

[35] *Id.* at 198-199. In Rumford Chemical Works v. Hygenic Chemical Co., 215 U.S. 156 (1909), testimony of decedent in action for own injury was excluded in action by administratrix for benefit of family.

[36] 1 F.R.D. 48 (S.D.N.Y. 1938).

[37] McInturff v. Insurance Co. of N. Am., 248 Ill. 92, 93 N.E. 369, 140 Am.St.Rep. 153, 21 Ann.Cas. 176 (1910).

[38] Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320 (D.N.J.1944).

[39] Insul-Wool Insulation Corp. v. Home Insulation, 176 F.2d 502 (10th Cir. 1949).

[40] Bartlett v. Kansas City Public Service Co., 349 Mo. 13, 160 S.W.2d 740, 142 A.L.R. 666 (1942).

introduce prior testimony of witnesses in the husband's case. One attorney for the husband also represented the wife. It is to be noted that there was not technical privity here because there were two separate claims, and the evidence was admitted against a party who was not a party in the first action. Even that case does not go as far as Wigmore and McCormick would go, because in the Missouri case the court stresses the family relationship of the two plaintiffs and the fact that both had the same trial attorney. Dean Wigmore wrote:

> It ought, then, to be sufficient to inquire whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has; and the determination of this ought to be left entirely to the trial judge.[41]

Of Wigmore's view it has been pointed out that if, for example, the derailment of a train has caused injury to a score of passengers and a witness has testified to the circumstances of the accident in an action brought by X to recover for his injuries, and has since died, the evidence of such witness may be read by any other injured passenger upon the subsequent trial of his action for damages.[42] But it would also be admissible if offered by the railroad against any of the other passengers. There is some risk in the latter situation; suppose the first case involved lesser injuries and the plaintiff's case was not prepared well and the cross-examination not thorough; nevertheless under Wigmore's view the testimony would be admissible against all of the other injured plaintiffs.

Arizona Rules, Statutes and Cases

Arizona Rule of Civil Procedure 43(e), which is of statutory origin and not in the Federal Rules, limits use of transcript of testimony to "a subsequent trial or proceeding had in the same action." If strictly construed this could mean that it is not usable if the action is dismissed without prejudice and a new action is filed on the same claim. But it could be more liberally construed to mean the same claim or cause of action.[43] Even that result would be more strict than most modern cases

[41] 5 WIGMORE, EVIDENCE § 1388 at p. 95 (3d ed. 1940); see MCCORMICK, EVIDENCE §§ 232, 238 (1954).

[42] Circuit Judge LaCombe in Metropolitan Street Railway Co. v. Gumby, 99 Fed. 192 (2d Cir. 1900).

[43] Concerning the statutory predecessor of Rule 43(e) it is said in Inspiration Consol. Copper Co. v. Bryan, 31 Ariz. 302, 310, 252 Pac. 1012, 1015 (1927):

> It is the contention of defendant that this statute is one of the most rigid in the United States, and should therefore be strictly construed . . . The

which require only that the testimony concern the same issue although there may be a difference in the theories of the actions or in the nature of the relief sought or even in the causes of action or defenses.[44]

The statute of which Rule 43(e) is the successor has been held to prevent plaintiff's use of the transcript of testimony of witnesses in a personal injury action in a later action by the administratrix of the first plaintiff in a wrongful death action for the benefit of the widow and children arising out of the same accident because there were different parties plaintiff and different actions and causes of action.[45] However, in an action under the Employers' Liability Act substitution of the parents of deceased as plaintiffs instead of his administrator after the first trial does not preclude use of the prior testimony.[46]

In Arizona transcribed testimony in a court of record in both civil and criminal cases may be used in a subsequent trial of the same case only if "the witness dies or is beyond the jurisdiction of the court" in which the action is pending.[47] Yet depositions in civil and criminal cases and testimony at preliminary hearings in criminal cases may be used if for *any* reason the witness is unavailable.[48] Suppose the witness has become insane, or his memory has failed concerning the facts, or there is a supervening disqualification of the witness, or the exercise of a privilege not to testify.[49]

It is incongruous that prior testimony in a court of record, though of a higher order, has less extensive use from the standpoint of unavailability of the witness than depositions and testimony at preliminary hearings. Probably the only explanation is historical—the rules dealing

> premise may be true, but if so it is all the more reason that in the interest of justice the construction of the statute should be liberal. Its object is to supply a method of producing evidence before a court which is material and admissible, but which cannot otherwise be obtained. We think that in view of this obvious and salutary purpose we should construe the statute so as to effect that purpose and not to defeat it . . .

[44] McCormick, Evidence § 233 (1954).

[45] Tom Reed Gold Mines Co. v. Moore, 40 Ariz. 174, 11 P.2d 347 (1932).

[46] Inspiration Consol. Copper Co. v. Bryan, 31 Ariz. 302, 252 Pac. 1012 (1927).

[47] Ariz. Rules of Civil Proc., Rule 43(e); Ariz. Rules of Criminal Proc., Rule 256. Although the rules specifically mention reading the transcript the court reporter may read from his notes. Estate of Sorrells, 58 Ariz. 25, 117 P.2d 96 (1941). It is proper under Crim. Rule 256 to read to the jury in the second trial of a criminal case testimony of a witness now out of the state notwithstanding Arizona has adopted the Uniform Act to Secure Attendance of Out of State Witnesses, A.R.S. § 13-1863. State v. Jordan, 83 Ariz. 248, 320 P.2d 446 (1958).

Absence from state need not be permanent. Inspiration Consol. Copper Co. v. Bryan, *supra* n. 46. Sufficient foundation is laid by testimony showing reasonable efforts to locate absent witness. B. W. L. Sam v. State, 33 Ariz. 383, 265 Pac. 609 (1928). But an affidavit is insufficient. Valuenuela v. State, 30 Ariz. 458, 248 Pac. 36 (1926); see McCreight v. State, 45 Ariz. 269, 42 P.2d 1102 (1935).

[48] Depositions in civil cases, Rule 26 (d)(3); in criminal cases, A.R.S. § 13-1905; testimony at preliminary hearings, Rules of Crim. Proc., Rule 30.

[49] Unavailability of the witness is discussed in 5 Wigmore, Evidence §§ 1401-1414 (3d ed. 1940); McCormick, Evidence § 234 (1954).

with use of testimony in a court of record are taken from early statutes. The statutes and court rules dealing with prior testimony show the need of improvement to avoid this incongruity concerning unavailability of the witness, and to permit use of former testimony against a party if he had the opportunity and motive to cross-examine the witness concerning the same issue in the prior action even though the claims or defenses may not be identical.

The Husband's Management* of Community Real Property

JACK J. RAPPEPORT†

A comparison of the laws of five community property states concerning the extent and nature of the husband's right to control or dispose of real property. (Arizona, Idaho, Nevada, New Mexico, Washington)

PART I: *The History, Nature and Concept of Community Control*

It has been suggested that the community property system, as it developed in the civil law, was an advance over the common law system of marital rights;[1] but it is uncertain whether, in its present form in the eight community property states, it is to be preferred to the modern statutory system found in the other states.[2] In any event, the community system has added its share of perplexities to the law.

The intrusion of judicial anachronism in the well-settled civil law principles of community property has led several writers to conclude that the system is lacking as a law of marital property, for the simple reason that the uncertainty it injects into transactions between the spouses as a unit and third persons more than offsets the values claimed for it.[3]

It is quite generally agreed that the system, as it is found in the United States, had its immediate origin in the system of Spain and Mexico.[4]

* The helpful comments of Professor Wiliam Edward McCurdy of the Harvard Law School in the preparation of this article are hereby gratefully acknowledged.

* See Contributors' Section, p. 117, for biographical data.

[1] VERNIER, FAMILY LAW, § 178 (1935).

[2] The contrast that is usually made is between community property jurisdictions on the one hand, and common law jurisdictions on the other; but the contrast is rather between community property states and non-community property states. Even in community property states, Anglo-American common law is used to fill in gaps, and in non-community property states, there is not only old common law in the strict sense, but also Married Women's statutes. Therefore, in drawing distinctions herein, the term "common law," unless otherwise indicated, will be used to refer to the situation before the Married Women's statutes in non-community property states only.

[3] Powell, *Community Property—A Critique of its Regulation of Intrastate Family Relations,* 11 WASH. L. REV. 12 (1936).

[4] De Funiak, *A Review in Brief of Principles of Community Property,* 1 KY. L.J. 32 (1912).
Nevada—*In re* Williams Estate, 161 Pac. 741 (1916);
New Mexico—Beals v. Ares, 25 N.M. 459, 185 Pac. 780 (1919);
Arizona—La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426 (1914);
Idaho—Kohny v. Dunbar, 21 Idaho 258, 121 Pac. 544 (1912);
Washington—Mabie v. Whitaker, 10 Wash. St. 656, 39 Pac. 172 (1895).

It is not within the scope of this paper to recapitulate the entire history of community property from its earliest beginnings in Visigothic law.[5] Spanish law in the United States can, however, easily be traced to the states having the community system, and dates from the arrival of the first Spanish explorers in the several areas.[6] From the historical approach, the question in each of the states under consideration, as to whether the system in force at present is a continuation or a statutory adoption of the Spanish law can probably never finally be put to rest. However, just as resort is had to English law to ascertain the underlying principles of Anglo-American common law which our forefathers brought with them from England, resort should also be had to the original sources when dealing with the Spanish system.[7]

The authoritative sources of these principles and concepts of community property law are the Spanish codes[8] and the commentaries thereon by the Spanish jurists and jurisconsults rather than decisional law. This is so, because the Spanish legal system was totally independent of the influence of judicial precedent, and the common law doctrine of stare decisis.

The influence of the Spanish law in each of the several community property states depends, to a considerable degree, upon the extent of Spanish colonization in a particular area; there is a broad contrast between the effect of native law where our settlers went into savage country, and where they went into regions having a developed property system. In areas such as Arizona and New Mexico, for example, where

[5] However, a brief review of the Spanish legislation on the subject is helpful, because the laws of Spain are found in a series of compilations, rather than in a single code:

A—FUERO JUZGO (originally called the Forum Judicum), the first national code of Spain, 671-693.

B—FUERO REAL, a new collection of the laws and customs of Castile, published by Alfonso X in 1255.

C—SIETE PARTIDAS, 1255-1265.

D—LEYES DEL ESTILO (a code of practice), published 1300-1310.

E—LEYES DE TORO (a supplementary compilation of civil laws), 1505.

F—NUEVA RECOPILACION, 1567.

G—RECOPILACION DE LEYES DE LOS REYNOS DE LAS INDIAS, 1680.

H—NOVISIMA RECOPILACION, compiled by Juan de la Reguera Valdelomar, 1805.

Upon completion, the NOVISIMA RECOPILACION was made applicable to all of Spanish America, with a provision that where this code proved inadequate to handle a particular situation, the laws of Castile were to be applied.

[6] SCHMIDT'S CIVIL LAW IN SPAIN AND MEXICO, Introductory History, Chapter V. (1851).

[7] *Ibid.*

[8] See note 5 *supra.* One problem raised in connection with the use of the term "common law" is that even in community property states, the Spanish background may be said to constitute a sort of common law, since, if it exists at all, it is not by virtue of giving effect to any Spanish statute. This is analogous to speaking of certain English statutes as common law statutes, which although not specifically re-enacted, are considered to be part of the law brought over from England.

the United States conquered a civilized people, all laws in force at the time of the conquest not repugnant to or inconsistent with the Constitution and laws of the United States became the rule of action and decision.[9] In these territories, the influence of the underlying Spanish culture was strongest, and consequently, it is in these areas that the influence of civil law principles is greatest. On the other hand, although the Spanish explorers went as far north as what are now the states of Washington and Idaho, this area was, at the time of its acquisition by the United States, either uninhabited or occupied principally by savages. It is surprising that Idaho and Washington have the community system at all, in view of the fact that the Spanish substratum was so thin in contrast to the first English-speaking people who went there and brought their common law with them. While these two states did not have the community property system until it was introduced by territorial statutes modelled after those of California,[10] once given that starting point, recourse could thereafter be had to the whole body of community property law.[11]

In Washington, for example, the Act of 1869, having declared certain property to be community property, did not make provision for the disposal of such property upon the death of either spouse. Nevertheless, the Supreme Court of Washington felt that without anything further than was contained in the Act of 1869, the Territorial Court was bound to administer such property according to the established rules of those jurisdictions where community property laws existed.[12]

The object of the present study is to compare the degree of the

[9] KEARNEY CODE, LAWS § 1 C.L. 1897, p. 82, REVISED STATUTES AND LAWS 1865, p. 512. *In re* Gabaldon's Estate, 38 N.M. 392, 34 P.2d 672 (1934). See also 35 COLUM. L. REV. 947 (1934). There is a strong desire here to avoid disturbing vested titles.

[10] LAWS OF WASHINGTON TERRITORY, 1869, p. 318. This original statute passed on December 2, 1869, "an Act defining the rights of husband and wife" was largely copied from the California statute of 1850. The husband was awarded the management of the common property, subject to complaint by the wife of mismanagement of her share by her husband. If the wife did complain, the court, in its discretion could exact a bond from the husband, conditioned on proper management, or decree a separation of the property, or award the wife such portion of the husband's property as it deemed just. The power of disposition and encumbrance of common property was held by the husband, except that the wife was required to join in sales of real estate. See Lobingier, *History of Conjugal Partnership*, 63 AM. L. REV. 250 (1929).

[11] This is analogous to the position of ecclesiastical substantive law in the marriage and divorce area. BISHOP, MARRIAGE, DIVORCE AND SEPARATION, Ch. 8, § 121-128 (1881) 6th ed.

[12] Hill v. Young, 7 Wash. St. 33, 34 Pac. 144 (1893). An analogous situation universally applicable in the Anglo-American system is that when a state legislature copies a statute from another jurisdiction, the decisions of the other jurisdiction before enactment are always authority. (Perhaps not so strong as the court's own decisions, but more than persuasive, insofar as they are regarded as substantive matters and not purely statutory.) Those thereafter are persuasive.

husband's control in five of the community property states[13] with a constant awareness that although the decisions are based largely on similarly worded statutes[14] there is a wide diversity in the interpretation of these statutes by the courts. In both Washington and Idaho, the husband and wife are regarded as having vested interests in community property. In both the husband is said to have the management and control.[15] In Washington, he cannot subject community property to his separate debts.[16] In Idaho, the community real estate is liable to attachment and execution for the debts of the husband, whether incurred for his own use or for the benefit of the community.[17] In Washington, the husband has control over the wife's earnings;[18] in Idaho, he has not.[19] It is believed that these differences in the application of several bodies of law which are fundamentally identical, reflect a recognition of different legal concepts on which the decisions are based.

Under Spanish law, the spouses owned the community property equally by halves. The husband's right to management and control did not affect the wife's title or place it on a lower plane. Had Spanish law intended to give the husband a greater right or title, or exclusive ownership of the property, in addition to the management thereof, it would have been spelled out as full and absolute dominion ("Dominio pleno y absoluto").[20] It would follow that if all rights of ownership and management were in the husband, there would be no rights of ownership remaining attributable to the wife. However, Febrero says[21] "To the married woman is given and transferred *in habito* . . . and *potencia* the ownership and the *revocable* and *constructive* possession of half of the goods earned and acquired with the husband during marriage."[22] (emphasis supplied).

[13] Arizona, Idaho, Nevada, New Mexico and Washington.

[14] ARIZONA REVISED STATUTES ANNOTATED (1956); IDAHO CODE (1947); NEVADA REVISED STATUTES (1957); NEW MEXICO STATUTES ANNOTATED (1953); REVISED CODE OF WASHINGTON (1953).

[15] R.C.W. c. 26; 1953; IDAHO CODE, c. 32 (1947).

[16] Huyvaerts v. Roedtz, 105 Wash. 657, 178 Pac. 801 (1919).

[17] Holt v. Empey, 32 Idaho 106, 178 Pac. 703 (1919). The basis of the decision without reference to Spanish law was a statement in 5 R.C.L. 858 to the effect that community property is liable for the separate debts, obligations and liabilites of the husband.

[18] Wamsley v. Rostad, 272 Pac. 722 (Wash. 1928).

[19] IDAHO CODE, § 32-912 (1947).

[20] DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, 284 (1943).

[21] Josef Febrero, a royal notary, published in 1769 a handbook for notaries called the Libreria de Escribanos. Although he was neither a lawyer nor an eminent jurisconsult, his work is often referred to in the American decisions, probably because of the comparative ready availability of the Mexican Edition, the FEBRERO NOVISIMA (1828). *Cf.* FEBRERO MEJICANO, MEXICO (1834) 9 v: NUEVO FEBRERO MEJICANO (1851-52) 4 v.

[22] 1 Febrero Mej. 225.

There is some respectable early opinion to the effect that the foregoing quotation from Febrero means that the husband during the marriage held the full proprietary rights to community property, and the wife had no actual proprietary right until the dissolution of the community.[23] However, the modern weight of authority, which is believed to represent the better view, interprets the same passage from Febrero to mean that the spouses both possessed and owned the property by halves during the marriage itself.[24]

At one time, California[25] and New Mexico,[26] and even the United States Supreme Court,[27] followed the first view. The Louisiana courts in the early part of the nineteenth century in purporting to follow the Spanish law, took the view that one-half of the community property belonged to the wife during coverture.[28] Nevertheless, in 1847, in the famous case of *Guice v. Lawrence*[29] the Louisiana court said that the provisions of the Louisiana Code embodying the Spanish law have never recognized a title in the wife during marriage to one-half of the acquests and gains. The court apparently thought that the Spanish description of the husband as "dueno de todos" meant that he was owner of everything, and that the wife only became owner of her half upon dissolution of the marriage. This "misapprehension"[30] has been explained as being due to a mistranslation of Febrero, who, in discussing the husband's right to administer the common property, says that the wife must not interfere with the husband's management by claiming that she "tiene" (holds) the property. It is said that the word "tiene" was mistranslated to mean "owns" the property, when it really means only holding for purposes

[23] McKay, Community Property § 287, p. 349 (1910).

[24] De Funiak, *op. cit. supra*, note 20, at 280.

[25] Banaud v. Jones, 1 Cal. 513 (1851). California, the only jurisdiction where adherence to the view that the wife has only an expectancy has been overruled, the rule has been changed by statute. See Deering's California Civil Code, 1949-§ 161.a. "[Interests in community property.] The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property. [Added by Stats. 1927, p. 484.]"

[26] Reade v. de Lea, 14 N.M. 442, 95 Pac. 131 (1908). But see Beals v. Ares, 25 N.M. 459, 185 Pac. 780 (1919).

[27] See Garrozi v. Dastas, 204 U.S. 64 (1907). But see Arnett v. Reade, 220 U.S. 311 (1911); Hernandez v. Becker, 54 F.2d 542 (1931).

[28] Dixon v. Dixon's Executor, 4 La. 188, 23 Am. Dec. 478 (1832); Theall v. Theall, 7 La. 226, 26 Am. Dec. 501 (1834). See notes 32 and 33, infra.

[29] 2 La. Ann. 226 (1847).

[30] This translation,

> Wherefore, while the husband lives, and while there is no divorce or dissolution of the marriage, the wife ought not to say that she has any gananciales, nor to hinder him in the lawful use of the property acquired, upon the pretext that the law allows her half of it,

appears in English in numerous American cases; *e.g.* Fuller v. Ferguson, 26 Cal.

of managership. Febrero's explanation in another part of his work that upon the death of the husband, the wife need make no formal demand for her half of the property, because it already belongs to her, is cited in support of this contention.[31]

It is felt that the divergence of views in the Louisiana court between the earlier cases and *Guice v. Lawrence* was not simply the result of failing to perceive the distinction between ownership and possession, or of mistranslating Febrero. It is submitted that Febrero is vague and ambiguous on this point, and that it is unfortunate that the courts which have taken an erroneous view of the Spanish law did not have more reliable Spanish source materials available. The fact that the Louisiana court could take such contradictory stands on the subject (of whether the wife had an interest or merely an expectancy), all the while protesting that Febrero was perfectly clear on the point, attests to his ambiguity and vagueness.

For example, in *Theall v. Theall* and *Dixon v. Dixon*, in reliance on the Novisima Recopilacion[32] and Spanish commentators, notably Febrero,[33] it was decided that the wife's ownership of half of the community during the marriage was vested and absolute, and not a mere expectancy. On the other hand, in *Guice v. Lawrence*, the court in holding that the wife did not have a vested interest during coverture, stated,

> The laws of Louisiana have never recognized a title in the wife during marriage, to one-half of the acquets and gains. The rule of

547 (1864); Guice v. Lawrence, 2 La. Ann. 226 (1847). See also Moreau v. Detchemendy, 18 Mo. 522, 528 (1853)—

> The right which the wife had in the property of the community, acquired during the marriage, was not the estate of a joint owner, entitled to claim its administration or to call the other owner to account. It is said by Febrero that the ownership of the wife is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife cannot say that she has acquisitions, nor is she to prevent her husband from using them, under the pretext that the law gives her one-half. But the marriage being dissolved, she becomes irrevocably the owner of one undivided half, in the manner provided by law for joint ownership. The husband is, during marriage, the actual and true owner of all. (FEBRERO, book 1, ch. 4, paragraph 1, Nos. 29 and 30.)

[31] DE FUNIAK, *op. cit. supra*, note 20, at § 99, p. 281.

[32] Theall v. Theall, 7 La. 226, 26 Am. Dec. 501 (1834) — "One half of the community property belonged to the wife independent of the testator's will, and in it she had a vested right, at the time the will is dated, as well as at his death . . .", citing NOVISIMA RECOPILACION, lib. 10, tit. 4, law 1. "If a husband bequeaths anythings to his wife, it shall not be taken out of her *ganaciales*, but she shall have it besides them . . .", citing NOVISIMA RECOPILACION, lib. 10, tit. 5, law 5.

[33] Dixon v. Dixon, 4 La. 188, 23 Am. Dec. 478 (1832):

> . . . if the husband alienates, during coverture, the acquèts and gains with the intention of injuring the wife, she may, at his decease, bring an action to set aside the alienation. The laws of Spain seem to have furnished that doctrine to the jurisconsults who prepared our Code. And the exercise of such a right does appear to us utterly opposed to the principle that the wife has no interest

> the Spanish law on the subject, is laid down by Febrero with his usual precision. The ownership of the wife, says the author, is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has gananciales, nor is she to prevent the husband from using them, under the pretext that the law gives her one-half. But, *soluto matrimonio,* she becomes irrevocably the owner of one undivided half, in the manner provided by law for ordinary joint ownership. The husband is, during marriage, *real y verdadero dueno de todos, y tiene en el efecto de su dominio irrevocable.* [Febrero Adic., tomo 1 y 4, part 2d, bk 1st, chap. 4, parag 1, nos. 29 and 30] . . . The provisions of our Code on the same subject are the embodiment of those of the Spanish law, without any change . . . As well might it be said that children have a title in the property of their father, because he is prohibited from disposing of it in fraud of their *légitime* . . .

Mr. Justice Holmes, in *Arnett v. Reade,*[34] a case holding opposite to *Guice v. Lawrence* on the nature of the wife's interest, recognized that the indiscriminate use of a word, such as "dominio", by the Spanish commentators, at times to mean *ownership,* and at others to mean *control,* could readily lead to mistranslations.[35]

Then in the case of *Phillips v. Phillips,*[36] the court set the law in Louisiana to rights again, stating,

> The wife's half interest in the community property is not a mere expectancy during the marriage; it is not transmitted to her by or in consequence of a dissolution of the community. The title for half of the community property is vested in the wife the moment it is

in the property, until the community is dissolved; for if she has not, how can she maintain an action to set aside the alienation? . . .

The court then quoted Paillette on the 1437th article of the NAPOLEONIC CODE: "Du moment ou le mariage est contracté, la communauté convenue expressément, ou tacitement, acquiert une éxistence, et une forme irrevocable. Les rapports avec les époux sont à jamais déterminés." The French authority cites FEBRERO *inter alia.*

[34] 220 U.S. 311 (1911).

[35] Even if properly translated, the Spanish commentators do not present a clear statement of the law, because they were not in accord as to the meaning of certain terms, such as "revocable" — see DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 101 (1943). This ambiguity was noted by the United States Supreme Court in Arnett v. Reade, see note 27, *supra,* where the Court, speaking through Mr. Justice Holmes, in the course of discussing the meaning of the word "dominio" which is used to describe ownership, stressed the irreconcilability of the holding that the wife had a mere expectancy, with the New Mexico statute of descent and distribution (which provided for the descent of a certain share of the deceased wife's property to the surviving husband.) If the wife had only the expectancy of an heir, the husband's share would continue to be his, rather than descend from her to him.

[36] 160 La. 813, 107 So. 584 (1925).

> acquired by the community or by the spouses jointly, even though it be acquired in the name of only one of them. . . . The statement to the contrary in *Guice v. Lawrence* was an error, resulting from a wrong translation of the Spanish word *dominio* used by the commentator, Febrero. He used the word *dominio* as meaning *dominion* or *control,* but not ownership, in describing the authority of the husband over the community estate . . .

In Spain, apparently, the wife had title to the fee in one-half of the community, while the husband had control of the whole. This Spanish concept should not have been a difficult one for common law trained courts, since there is a somewhat analogous situation in a common law tenancy by the entirety with respect to realty.[37] Under a common law tenancy by the entirety, the husband and wife are each seised of the whole (per tout). But the husband had virtually unlimited administrative control, which sprang from his common law rights acquired under seisin, and not from any higher quality of his legal estate.[38] This analogy is not perfect, however, because management of an estate by the entirety did not include a power of alienation in the husband without the wife's joinder,[39] and the rents and profits became the husband's absolutely,

[37] A tenancy by entirety in personalty at common law was possible, if at all, only to a limited extent, because tangible chattels immediately became the husband's absolutely by operation of law, irrespective of whether acquired prior to or during coverture. Another example of ownership in the one and management in the other under Anglo-American common law existed in reference to the husband's position generally in respect to the wife's realty. Whereas in a tenancy by the entirety, the husband was a special joint owner, in reference to the wife's realty he was not an owner at all, since the wife's title is unaffected by marriage. Nevertheless, under the doctrine of jus mariti, he was, by virtue of, and during the existence of the marriage, entitled to the use and enjoyment thereof. The common law expressed these things as rents and profits. The husband got this possessory right by operation of law, without the necessity of any further acts on his part.

[38] La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426 (1914) ". . . in its devolution and descent this species of ownership [community property] bears a striking resemblance to the two kinds of estates, that of an estate in a tenancy by the entirety, and a tenancy in common . . ."

[39] Newman v. Equitable Life Assur. Soc., 119 Fla. 641, 160 So. 745, 747 (1935)—

> By the common law the husband could not convey an estate by the entireties except subject to the wife's indivisible right to the entire estate, should she survive the husband. If the husband conveyed such an estate and he survived his wife, her rights ceased, and his conveyance estopped him. Under the Florida law, an estate by the entireties can be conveyed only by deed duly executed by husband and wife which includes a separate acknowledgment by the wife as required by section 5676 (3803), COMP. GEN. LAWS OF FLORIDA.
>
> At common law, estates by the entireties could not be conveyed by livery of seizin by the husband because of the wife's indivisible interest in such estate and because of the legal fiction of her unity with her husband and his constraint over her. Such estates as well as dower and other interests the wife had in lands were conveyed by means of collusive suits known as fine and common recovery referred to above.

rather than accruing to both spouses equally.[40] Nevertheless, it is close enough for common law trained lawyers and judges to grasp the principles of community property.[41]

The community property system, as it developed under the civil law, appointed the husband as manager of the common interests. This was because of the necessity for a single administrative agent to avoid the impasse that might arise in case of disagreement, were the power of final decision not lodged in one of the marital partners. The husband was appointed manager of the common interests for the equally, if not more important, sociological consideration that in former times, at least, the husband was more competent in business matters.[42] In the Spanish law, when the husband acted on behalf of the community, he did so as a fiduciary. It was incumbent upon him to manage and administer the estate honestly and efficiently. If the wife's interests were dealt with improperly, she had an immediate and complete remedy in an action at law.[43]

The basic philosophy underlying the conjugal partnership in acquests and gains during marriage is that while the husband generally supplies money or other property and the wife supplies work in the home, yet both, during the existence of the marital community, do everything in their power to further the success and well-being of the marital community and to achieve this result, although each spouse retains ownership

[40] Under the Spanish law, each spouse could, within specified limitations, dispose by will of his or her respective share of the community property. (See note 73, *infra.*) At common law, even after the Statute of Wills, the husband could not dispose of his interest by will in the event that he predeceased the wife, since an important feature of a tenancy by entireties was the incident of survivorship.

It would seem that at common law, the convenient application of the unity theory would preclude an action by the wife against the husband for committing waste to the freehold. Under the community system, the wife could maintain an action against the husband or anyone who participated with him in the wrongful use of the property. (See note 235, *infra.*)

Originally, at common law, land was not attachable. The nearest thing to an attachment is the Writ of Elegit, which permitted the appropriation of the rents and profits until the debt was satisfied. In a tenancy by entireties, neither spouse's creditors could attach the entirety property. There is some indication that entirety creditors could attach the entirety property, but it is not clear what constituted an entirety debt. See note 229a, *infra.* Community property was similarly liable only for community debts which, for the most part, were incurred by the husband in his capacity as community manager. That these similarities and differences exist was noted in: Wilcox v. Penn Mut. Life Ins. Co., 357 Pa. 581, 55 A.2d 521 (1947); Hernandez v. Becker, 54 F.2d 542 (1931).

[41] De Funiak, *A Review in Brief of Principles of Community Property,* 32 Ky. L.J. 63 (1943).

[42] Daggett, *Is Joint Control of Community Property Possible?,* 10 Tul. L. Rev. 589 (1936); Poe v. Seaborn, 282 U.S. 101, 112 (1930); La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426 (1914). The same problem arises in a common law partnership which may be solved by providing for a managing partner.

[43] Chavez v. McKnight, 1 N.M. 147 (1857). For authority that the wife, under Spanish law, has a remedy for an alienation made in fraud of her by her husband, see Novisima Recopilacion, Book 10, Title 4, Law 5.

of his or her separate property, the fruits and profits thereof are to be shared in common.[44]

It is highly significant that the early development of the community property law in the United States coincided with the 19th Century trend toward the legal emancipation of women, which culminated in the Married Women's Property Acts, the first of which appeared in 1839.[45] The modern doctrine of equal rights embodied in these Acts had no less an impact upon the management of community property than it had upon that of property held by the spouses by the entireties and upon the husband's relation to his wife's property generally under the Anglo-American common law.[46]

The several community property states have interpreted Spanish law in terms of the variations in Anglo-American common law rules,[47] with the result that now there is considerable diversity among the community property states in this area, not only in the degree of the husband's control, but in the fundamental legal theory upon which his control or lack of control is justified. In most instances, this represented a trend toward a diminution in the husband's powers, with a corresponding increase in the powers of the wife. It should be observed that the relative

[44] "Let the Fruits of the Separate Property of the Husband or the Wife be Common" — NOVISIMA RECOPILACION, Book 10, Title 4, Law 3.

[45] Hitchcock, *Modern Legislation Touching Marital Property Rights*, 6 So. L. REV. (N.S.) 41 (1880).

[46] In a number of states, it is held that tenancy by the entirety has been abrogated by the Married Women's statutes, which are inconsistent with this type of tenancy. This abrogation is subject to the prospective application rule so as not to impair existing titles.

There is no state where a tenancy by the entirety has been expressly abolished by statute, but the Married Women's Acts have been so construed. Many states, however, will not regard a tenancy by entirety as abolished by implication; but some of its incidents may have been thus affected.

In Massachusetts, for example, there is some indication that although under the original tenancy by entireties, neither party had an attachable interest, at present, while an attachment against the wife's interest is still void, an attachment against the husband's interest is not void, but is subject to the possibility that the wife survives the husband. The rents and profits of property held by the entireties, however, are still the husband's absolutely.

In Pennsylvania, on the other hand, the common law tenancy by entireties, although retained for the most part, has been modified to the extent that the wife is immediately entitled to one-half of all income from property so held. On aspects of tenancy by the entirety, in both tangible and intangible personalty in Pennsylvania, see Rappeport, *Domestic Relations*, 20 UNIV. OF PITT. L. REV. 433, 472-474 (1958).

See 2 TIFFANY, THE LAW OF REAL PROPERTY, § 435 (3d ed. 1939); MCCURDY, CASES ON DOMESTIC RELATIONS, pp. 504-8, 594-6 (4th ed., 1952).

The jus mariti (the husband's right to receive rents and profits of the wife's real estate during coverture) was universally abolished by the Married Women's statutes (although some statutes do not affect curtesy). The groundwork for this statutory abolition has been laid by the equitable separate estate doctrine. See note 93, *infra*.

[47] Married Women's statutes are sometimes referred to as modified common law. However, modification, strictly speaking, is a matter of degree, and a statute creating complete contractual capacity where none existed before may be more than mere modification. Thus, the Connecticut court in Mathewson v. Mathewson, 79 Conn. 23, 63 Atl. 285 (1906) speaks of its statute of 1877 as instituting a complete new law of husband and wife.

willingness on the part of a court to find that property is the separate property of the wife will be commensurate with the strength or weakness of the wife's position with reference to community property in the particular jurisdiction.[48] There may be an emphatic difference in the several jurisdictions as to the significance and effect of various presumptions relative to the separate or community nature of the property.[49] Thus, the community property system of Spain and Mexico, which was the law of the Spanish colonies in our present community states for more than three hundred years, was transformed into new bodies of law owing to either one or both of the following factors:

(A) Inaccessibility of reliable community property materials, leading to an untoward reliance upon the vague and ambiguous commentaries of some of the Spanish jurisconsults. This, in turn, caused a widespread misconception and mistranslation of Spanish statutes.

(B) The superimposing of Anglo-American common law doctrines and terminology upon the well-settled Spanish law of marital property by judges and lawyers who often were not well-trained in either system.

With respect to the nature of the interests of the spouses in the common property, it would seem that four distinct theories evolved, which one writer[50] calls "the California, or single-ownership; the Washington, or entity; the Idaho, or double-ownership; and the Texas, or trust, theories". At present, however, by virtue either of statute or deci-

[48] Capp v. Rives, 62 Cal. App. 776, 217 Pac. 813 (1923).

[49] "All property possessed by husband and wife is presumed to be community and is to be divided equally unless it can be proved that a portion of the same is the individual property of one of them." — SCHMIDT, CIVIL LAW IN SPAIN AND MEXICO, art. 63; NOVISIMA RECOPILACION, Book 10, Title 4, Law 4. Savenant v. Le Breton, 1 La. 520, 522 (1830).

Compare the presumption in Bear Lake State Bank v. Wilcox, 48 Idaho 147, 279 Pac. 1090 (1929) which follow the Spanish law (above)—". . . Mrs. Wilcox was named as grantee in the deed received when the property was purchased . . . most of the payments upon the purchase price were made out of the money deposited in the bank in the name of her husband; and of course the presumption existed that the property belonged to the community . . ." and La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426 (1914)— ". . . the presumption in all doubtful cases is strongly in favor of treating that which either spouse may own as community property . . ." with Rhea v. Thompson, 114 Cal. App. 466, 1 P.2d 1091 (1931), applying the rule in California since 1889 to the effect that "All presumptions are in favor of conveyances to the wife, which are presumed to have been made for a consideration, paid by her, or, if it be conceded that the husband paid the consideration, to have been intended as a gift to the wife as her separate property . . ." See also N.M. STAT. ANN. § 57-4-1 (1953); Brown v. Gurley, 58 N.M. 153, 267 P.2d 134 (1954); United States Fidelity and Guaranty Co. v. Chavez, 126 F. Supp. 227 (1954) — A conveyance to spouses without mentioning husband and wife creates a tenancy in common.

[50] Evans, *The Ownership of Community Property*, 34 HARV. L. REV. 48 (1921). Tiffany, on the other hand, recognizes only two distinct views, namely, a California-Louisiana view, and a Texas-Washington view. See TIFFANY, REAL PROPERTY, p. 195 (2d ed. 1920). Cf. Lyons, *Development of Community Property Law in Arizona*, 15 LA. L. REV. 512, 516, note 29 (1955).

sion, the conception of the wife's interest as a sort of expectancy which becomes vested in her only upon the husband's death has been eliminated, and the fact of her present ownership of half of the common property is now recognized in all our community property states.[51]

The most striking change wrought by the doctrine of equal rights over the situation obtaining in the Spanish regime has occurred in conveyances of community realty. Under the Spanish system, it was and still is true that the husband could sell or encumber, and in general administer the common property without the joinder or consent of the wife. She had equal and vested title, but he had the control. He could not exercise that control to defraud the community, but as long as he acted efficiently for the benefit of the community, it is believed that he was the master. Under the modern doctrine, with the exception of Nevada,[52] the wife not only has equal title, but also equal rights as to the disposition of community realty. It is nevertheless true that with certain special exceptions, these states have never adopted a similar rule as to personal property, where for purposes of convenience and in order to have a managing partner, so to speak, the husband still has control. As the Married Women's Act mutation of the community system has evolved, with the exception of dispositions of realty, unlike the Spanish law,[53] so long as the manager acts honestly and fairly in a business sense, and reasonably directs his efforts toward a betterment of the community estate, the court will not interfere, and substitute its judgment and business acumen for his.[54]

With the metamorphosis wrought in the original system by the statutes and decisions, it becomes apparent that some changes have been intentional, reflecting to a large degree, a change in the status of married women. Others have resulted from the infiltration of Anglo-American common law principles and their misapplication. There are frequent references to Anglo-American common law to fill in gaps left by the statutes purporting to be modelled on the civil law. California and Arizona early fell into the error of attempting to equate the control of the husband under Anglo-American common law, which need redound only to his benefit, with the control of community property under Spanish civil law, which must be exercised only for the joint benefit of the spouses.

The law of community property of the Mexican Province of California became the law of the State of California through Article XI, Section 14 of the first Constitution of California,[55] which provided that

[51] 11 AM. JUR., COMMUNITY PROPERTY, § 78, 1937. This is also the rule in the three community property states not dealt with herein.
[52] N.R.S. § 123.230 (1957) — except as to the family homestead.
[53] Chavez v. McKnight, 1 N.M. 147 (1857).
[54] De Funiak, *op. cit. supra*, note 41.
[55] Ratified in 1849.

all the property which the wife owned before marriage or acquired thereafter by gift, devise or descent should be her separate property; and laws were to be passed more clearly defining the rights of the wife, both as to her separate property and her interest in community property. The legislature, pursuant to the constitutional mandate, enacted that the husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate, and that the rents and profits of the separate estate of either spouse shall be deemed common property.[56] This concept, far from being an innovation, was a continuation of the Mexican and Spanish law prevailing in California at the time of its acquisition by the United States.[57]

In *George v. Ransom*,[58] a *community creditor* sought to subject the proceeds of the separate estate of the wife to his claim. It was held that the legislative enactment so applied was unconstitutional because the effect of the statute "would be to make the wife the trustee for the husband, holding the legal title while he held the fruits of that title". The court further reasoned that the term "separate property" was used in the constitution in its (Anglo-American) common law sense, whereby the "separate property of the wife" meant an estate held both in its use and in its title *for the exclusive benefit of the wife.*

It is submitted that this view is erroneous, because the constitutional provision was merely restating the Spanish law which prevailed in California at the time of its enactment, and which deemed the profits of the separate estate of either spouse to be common property, *for the benefit of both.* However, even if it were assumed that the constitution intended that its terms be interpreted according to strict Anglo-American common law principles, under those principles the husband during coverture had the jus mariti in his wife's real estate, which meant that he received the rents and profits as his own, absolutely. It is believed that in order to protect the wife against the improvidence of her husband, the legislature engrafted upon a framework of community property principles the

[56] On April 17, 1850, an Act was passed, regulating the relations of husband and wife. See WOOD'S DIGEST 488, Section 9.

[57] RELACION DE LOS DEBATES, Convencion de 1849 (Debates of the Constitutional Convention of 1849) 262. "It will be remembered that this section is and always has been the law of the country." *Cf.* Banaud v. Jones, *op. cit. supra,* note 25.

For a contrary view, see JOURNAL LEGISLATURE OF CALIFORNIA (1850) p. 474-5, and Fowler v. Smith, 2 Cal. 39 (1852), denying the force of Mexican law and holding that a conveyance made three months before the formal adoption by the legislature of the common law, by one American to another, was to be governed by the (Anglo-American) common law and not the civil law. See statement of Mr. Diminick (later first Chief Justice of California) in Relacion de los Debates, Convencion de 1849; por J. R. Browne (1851) 262-3. For a complete discussion of the foregoing, see McMurray, *The Beginning of the Community Property System in California and the Adoption of the Common Law,* 3 CAL. LAW REV. 359 (1915).

[58] 15 Cal. 322 324 (1860).

common law doctrine of the equitable separate estate,[59] which itself reflected the influence of the civil law upon the English courts of equity.[60] The very wording of the statute[61] clearly reveals this legislative intent.

However, by the time of this case (1860), newly arrived judges and lawyers with scant legal training of any kind were already administering "justice" without regard to property laws which were well established in California at that time.

In arguing his case, counsel for appellant did not emphasize the fact that appellant was a *community* creditor, or the general intent of community property law to create a conjugal partnership in which there would be a maximum of profit sharing in marital economic gain.[62] Instead, the argument on behalf of appellant stressed that the constitution did not prevent the legislature from giving the "use" of the wife's separate estate to the husband; that it was wise and just to permit the fruits of the wife's property to go to the husband or *his* creditors because such profits were due mostly to his labors.

In Arizona, where the Statute of 1865[63] declared *inter alia* the rents and profits derived from separate property to be common property, it was held[64] that the Married Women's Property Act of 1871[65] repealed this

[59] See Rappeport, *The Equitable Separate Estate and Restraints on Anticipation: Its Modern Significance*, 11 MIAMI LAW QUARTERLY 85 (1956).

[60] See McCurdy, *Property Torts Between Spouses and Use During Marriage of the Matrimonial Home Owned by the Other*, 2 VILL. L. REV. 447 (1957).

[61] The husband shall have the entire management and control of the common property, with the like absolute power of disposition, as of his own separate estate; and the rents and profits of the separate estate of either husband or wife shall be deemed common property, unless, in the case of the separate property of the wife, it shall be provided by the terms of the instrument whereby such property may have been bequeathed, devised, or given to her, that the rents and profits thereof shall be applied to her sole and separate use — in which case, the entire management and disposal of the rents and profits of such property shall belong to the wife, and shall not be liable for the debts of the husband.

[62] 22 SCAEVOLA, CODIGO CIVIL 247 (1905), as quoted in De La Torre v. National City Bank of New York, 110 F.2d 976 (1st Cir. 1940). See also, Lyons, *Development of Community Property Law in Arizona*, 15 La. L. Rev. 512, 514 (1955).

Under the Idaho statute (§32-906 of the Idaho Code of 1947), the wording of which is almost identical with the California statute declared unconstitutional in George v. Ransom, the Idaho court has always held that the rents and profits of the separate property of the spouses is community property, unless the property is acquired by the wife, to be applied to her sole and separate use. *Cf.* Shovlain v. Shovlain, 78 Idaho 399, 305 P.2d 737 (1956). See also Bulgo v. Bulgo, 41 Haw. 578 (1957), holding that the Community Property Act of Hawaii (now repealed) although providing that future rents and income from property previously owned solely by either spouse become community property, does not take private property without due process of law, because the community property estate is created by law as an incident of the marriage relation.

[63] ARIZ. LAWS 1865, c. XXXI, § 9, at 61.

[64] The Charauleau v. Woffenden cases: 1 Ariz. 243, 25 Pac. 652 (1876) (citing George v. Ransom, 15 Cal. 322, 324 [1860] with approval); 1 Ariz. 346, 25 Pac. 662 (1876); 2 Ariz. 44, 8 Pac. 302 (1885); 2 Ariz. 91, 11 Pac. 117 (1886). Before the final decision in this series of cases had been handed down, the legislature enacted ARIZ. LAWS 1885, No. 5 at 5 (Now A.R.S. § 25-213, 1956) that the fruits and profits of separate property remain separate property.

Cf. Lyons, *Development of Community Property Law in Arizona*, 15 LA. L. REV. 512 (1955).

[65] ARIZ. LAWS 1871, p. 18.

statutory provision by implication. It should be noted that the controversy in these cases arose over a legislative attempt to permit the husband to manage and control only the profits of the separate property of the wife, and not the property itself during marriage. Yet the dedication of the acquests of the separate property of the wife to the common fund and their subjection to the husband's control were deemed confiscatory of the wife's property. These cases clearly illustrate an attempt to interpret community property principles, either in terms of the Anglo-American equitable separate estate doctrine, or the Married Women's Property Acts. The very effort to equate mutually repugnant and alien concepts with one another shows a want of comprehension of the nature and purpose of the community of property idea.[66]

PART II: *Transfers, Conveyances, and Encumbrances of Community Real Property*

Under Spanish law originally in force in parts of the United States, the husband can convey the properties of the conjugal partnership without the consent of the wife, and the conveyance is valid, unless it is made with the intention to defraud or injure her.[67] This provision applied equally to the alienation of both personalty and realty, and included gifts to third persons.[68] The husband and wife could contract with one another, but interspousal gifts of separate property were voidable.[69]

[66] See note 44, *supra*. As a matter of fact, under the Spanish law, the wife often gave the husband the right to control and manage her separate property, although she could, if she chose, retain control of it.

[67] NOVISIMA SALA MEJICANA, Section 2a, Title IV, No. 5.

> A dissolution of the marriage is not necessary to constitute the husband the real and true owner of property acquired after marriage, for during it, he has in effect the irrevocable dominion thereof, and thus he can manage, barter, and even though they be neither military earnings nor quasi-military earnings, can sell and alienate the same at his pleasure in the absence of an intent to defraud his wife as may be proved by law.—1 FEBRERO MEJICANO, Ch. 10, § 20, as quoted in Fuller v. Ferguson, 26 Cal. 547, 565 (1864).

[68] SCHMIDT, CIVIL LAWS OF SPAIN AND MEXICO, Art. 54; See Huie, *Community Property Laws as Applied to Life Insurance*, 18 TEX. LAW REV. 121 *et seq.* quoting the better rule from Febrero as "if the gift is small and made for just cause to relatives, servants or friends, it is valid; but if it is immoderate, or without legitimate cause for making it, or if it is such as would ruin the patrimony, or would reduce it considerably, to the contrary." Compare Hanley v. Most, 9 Wash. 2d 429, 115 P.2d 933 (1941). See also Shovlain v. Shovlain, 62 N.M. 330, 310 P.2d 266 (1957)—where the wife's separate property was improved through the husband's efforts and there was no contrary agreement, it was presumed that the husband intended to contribute his efforts to the wife's separate estate. *Cf.* Sackman v. Thomas, 24 Wash. 660, 64 Pac. 81 (1901); Peardon v. Peardon, 65 Nev. 717, 201 P.2d 309 (1948).

[69] In Labbe's Heirs v. Abat *et al*, 2 La. 553 at 565 (1831), the court expounded the Spanish law on this point (2 FEBRERO MEJICANO, tit. 44, 16), as follows: "According to these laws, it is clear that husband and wife were considered so far separate persons that they could validly enter into any onerous contracts between themselves. A sale is the example given to illustrate this doctrine. They seem to have been prohibited only from making donations to each other, during the marriage, of property actually in possession."

Although the donor's death rendered the gift irrevocable,[70] it could be invalidated either by the exercise of a power of revocation, exclusive in the donor, or by the donee predeceasing the donor.[71] However, either spouse could renounce his or her respective shares in all the community property or in any part of it; it thus follows that either could effectuate an irrevocable gift of his or her interest in the community to the other by this means.[72] Each spouse could dispose by will of his or her respective share of the community property, both personal and real; however, the dispositions were limited by an elaborate plan, primarily favoring blood relatives in the descending line, and in their absence, those in the ascending line.[73] When the husband became mentally incapacitated, the wife, upon application, could be appointed by the court as guardian, and as such was empowered to administer the community real property.[74] Also, when the husband failed to act, or when he absented himself without appointing an agent, and thereby "endangered" the property, the

[70] MCKAY, COMMUNITY PROPERTY, § 994; See Fuller v. Ferguson, 26 Cal. 547, 573 (1864)—"In the case of Labbe's Heirs it is said that husband and wife 'seem to have been prohibited only from making donations to each other during the marriage, of property actually in possession.'" But we are not to understand from this that a donation by one of the spouses to the other was absolutely void, rather voidable or revocable. Donations so made are declared voidable or revocable by Law 4, Title 11 of the 4th Partida. This law says,

> Such donations are prohibited in order that the parties may not be prejudiced thereby, and dispossess themselves of their property, through their mutual affection; and also because the one who was the most [sic!] avaricious would be in a better condition than the other who gave freely. And if they do make any such gifts after marriage, they will not be valid, if one of the parties become thereby poorer and the other richer, unless he who made the donation did not revoke or annul it during his life, for then it would remain valid. But if the party making the donation revoke it during his life by expressly saying — I do not wish such a donation made to my wife should be valid; — or if he observe silence in this respect, and afterward give or sell the same thing to another person, or if the party receiving the donation die before the party who made it; in either of these cases, the first donation will become void.

The rationale of the foregoing principle of Spanish law is analogous to that of the English courts of equity in permitting the restraint on anticipation to be attached to the sole and separate use trust for married women. Both reflect a realistic recognition of the possibility that without these safeguards, the husband might "kiss or kick" the wife out of her property.

[71] This latter concept is somewhat analogous to that of the lapse of testamentary gifts under Anglo-American common law.

[72] NOVISIMA RECOPILACION, Book 10, Title 4, Law 9.

[73] Where there were no lawful children or descendants in direct line, natural children might be favored, and ascendants excluded. (See NOVISIMA RECOPILACION, Book 10, Title 21, Law 6). The Spanish version of an entailed estate in certain property in favor of the eldest son (mayorazgo) was abolished both in Spain and Mexico in 1820. Where there were ascendants or descendants, only a limited proportion of the property acquired during coverture by onerous title could be devised to collaterals or strangers. (See ASSO AND MANUEL, INSTITUTES OF CIVIL LAW IN SPAIN, Book II, Title III, Cap. 2, 3.) However, in the absence of descendants or ascendants, the spouse might leave all his or her property to strangers or collateral relatives.

[74] ASSO AND MANUEL, INSTITUTES OF CIVIL LAW IN SPAIN, Book I, Title II, Cap. 11, 4, Cap. 3.

court had power to authorize the wife to manage the property.[75] The Mexican law went even further than the parent law of Spain. There, in case of the husband's incapacity or his unjustifiable desertion, the wife automatically became the lawful administrator of the conjugal partnership, in the absence of a court order to the contrary.[76]

This was the state of the community property law prevailing at the time of the annexation by the United States of the territories under discussion.

At present, with the exception of Nevada, a common attribute of all the community property states under consideration is the statutory requirement of the joinder of the wife in all conveyances or encumbrances of community realty to third persons.[77] Even in Nevada, where the husband may dispose of community realty as absolutely as he would his separate estate, no deed of conveyance or mortgage of *homestead* is valid unless both the husband and wife execute and acknowledge it.[78] In Arizona, the language of the first statute[79] seemed to go even beyond Spanish civil law, in that it allowed the husband to give away or waste the community property; today, by a gradual process of modification,[80] the wife's joinder has come to be required in all deeds and mortgages

The Spanish law provided for the appointment of a guardian for an insane or spendthrift husband, and although ordinarily women were not favored by the law as guardians, the objection did not exist with respect to a mother as guardian of her child, or a wife as guardian of her husband.

[75] SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO, p. 12, citing LEYES DE TORO, laws 57, 59, ". . . and in cases in the absence of the husband, when delay may be attended with danger." Compare the analogous developments in French community property law.

> In the time of Beaumanoir, the wife was also invested, as a matter of law, without the authority of court, with the powers of the husband whenever the husband was not present (absence, madness, imprisonment); but here again we must observe that she was in the same position under the system where there was no community; there were seen here cases of necessity which made the wife the provisional head of the household. At a later date, the authority of court was an indispensable thing, but she was none the less in a restricted way at the head of the community — BRISSAUD, HISTORY OF FRENCH PRIVATE LAW, THE CONTINENTAL LEGAL HISTORY SERIES, Vol. 3, p. 837.

[76] HALL, MEXICAN LAW, § 2626.

[77] A.R.S. § 33-452 (1956): "A conveyance or incumbrance of community property is not valid unless executed and acknowledged by both husband and wife, except unpatented mining claims which may be conveyed or incumbered by the spouse having the title or right of possession without the other spouse joining in the conveyance or incumbrance."; IDAHO CODE ANN. § 32-912 (1947); N.R.S. § 123.230 (1957); N.M. STAT. ANN. § 57-4-3 (1953); R.C.W. § 26.16.040 (1953).

[78] Worthy of mention is the fact that Texas and Louisiana have similar provisions. Moreover, in Texas, the husband acting alone may alienate or encumber the community homestead in favor of prior liens or equities enforceable against it if he is not acting in fraud of the wife's rights. See notes 120 and 169, *infra*. *Cf.* Kenyon v. Staufflet, 85 S.W. 2d 303 (1935).

[79] ARIZ. LAWS 1865, CXXXI, 9, p. 61—". . . the entire management and control of the common property with the like absolute power of disposition as to his own separate estate . . ."

[80] ARIZ. REV. STAT. § 2102 (1887); ARIZ. REV. STAT. § 3104 (1901); ARIZ. CODE ANN. § 71-409 (1939); A.R.S. § 33-452 (1956); See also ARIZ. CODE ANN. § 63-301 (1939) and A.R.S. § 25-211 (1956).

affecting community real estate, *except unpatented mining claims,* which are conveyable by either spouse in whose name title stands.

With respect to interspousal conveyances in the community property states under discussion, dual execution is not required, either by express statutory provision,[81] or by decisional law, the courts feeling that even where the statute does not so expressly provide, acceptance by the grantee is a sufficient joining in the conveyance.[82] Unlike Anglo-American common law restrictions on interspousal contracts and conveyances, the community system makes it possible for spouses to contract with and convey to one another. Interspousal transactions were permitted under Spanish law because the separate personality of the wife was not merged in that of the husband. Such dealings are permitted without the intervention of third persons as trustees, or strawmen, in all of the states under consideration herein.[83] Thus, in Washington, by statute, either spouse may enter into any transaction with the other with respect to property which either might have entered into if unmarried.[84] Any transactions by spouses inter se are subject to close judicial scrutiny for evidence of possible fraud or undue influence by either spouse.[85]

The Washington court has pointed out that husband and wife do not deal with each other at arm's length;[86] the relation of husband and

[81] N.M. STAT. ANN. § 57-4-3 (1953) is a typical statute:

> . . . provided, further, that any transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect, except that the husband may convey directly to the wife or the wife to the husband without the other joining in the conveyance.

See also R.C.W. § 26.16.050 (1953)—

> A husband may give, grant, sell or convey directly to his wife, and a wife may give, grant, sell or convey directly to her husband, his or her community right, title, interest or estate in all or any portion of their community real property. And every deed from husband to wife, or from wife to husband, shall operate to divest the real estate therein recited from any or every claim or demand as community property, and shall vest the same in the grantee as separate property . . .

For analogous treatment in a non-community property state, see F.S.A. § 689.11 1953:

> A conveyance of real estate, made by a husband direct to his wife, or by a wife direct to her husband, shall be effectual to convey the legal title to such wife, or husband, as the case may be, in all cases in which it would be effectual if the parties were not married, and the grantee need not join in the execution of such conveyances.

[82] Schofield v. Gold, 26 Ariz. 296, 225 Pac. 71 (1924), the court saying that, since in joining in the conveyance to the third person, each is acting for himself and herself, and each holds the same interest in the property conveyed, there is no reason why one, even the wife, may not convey his or her interest to the other without both having to join as grantors.

[83] At Anglo-American common law, the unity theory was conveniently applied to this situation.

37 A.L.R. 282 (1925) — Texas, not one of the states herein considered, is the only exception, requiring a trustee for conveyances from the wife to the husband, but not from the husband to the wife.

[84] Seaton v. Smith, 186 Wash. 447, 58 P.2d 830 (1936).

[85] See also Beals v. Ares, 25 N.M. 459, 185 Pac. 780 (1919); Primus v. Clark, 48 N.M. 240, 149 P.2d 535 (1944).

[86] *In re* Madden's Estate, 176 Wash. 51, 28 P.2d 280 (1934).

wife is one which demands the utmost good faith and frankness in dealings with one another. Hence, if lack of good faith is charged, the one seeking to sustain the agreement has the burden of proving that it was fair, and entered into with full knowledge of the facts by the other.[87] This rule being statutory,[88] it is questionable as to whether it would be adopted in the other community property states, apart from statute.

The courts of Arizona and Washington, in holding that the husband and wife may contract with each other concerning their property rights, have said that the contract will be construed in accordance with the intention of the parties as expressed therein, and as deducible from the surrounding circumstances. But if the validity of the transaction is at all doubtful, the property will be presumed to be community.[89]

The spouses may, in all of the community systems in this study, contract to change the character of property from community to separate or from separate to community.[90] Either spouse may make a gift of his or her community interest to the separate estate of the other, if the rights of third persons are not prejudiced thereby.[91] The character of property held as community or separate may be transmuted into property held by the spouses as tenants in common. In Arizona, New Mexico and Nevada when the question has arisen, the courts have held, either expressly or impliedly, that the transmutation may be to joint tenancy.[92] Although the surest means of accomplishing a transmutation would seem to be by conveyance, other evidence of transfer of title may be equally effective, depending upon the nature of the property involved. In Washington, however, a statute has in practical effect converted joint tenancy, with certain exceptions, into tenancy in common.[93] Since this statute

[87] Smith v. Saul, 128 Wash. 51, 221 Pac. 977 (1924); Hamlin v. Merlino, 44 Wash. 2d. 851, 272 P.2d 125 (1954).

[88] R.C.W. § 26.16.210 (1956) — "In every case, where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith."

[89] See note 49, *supra.* Tyson v. Tyson, 61 Ariz. 329, 149 P.2d 674, 679 (1944); *In re* Madden's Estate, *op. cit, supra,* note 86.

[90] Russo v. Russo (see note 94, *infra). In re* Baldwin's Estate, 50 Ariz. 265, 71 P.2d 791 (1937); Lightning Delivery Company v. Matteson, 45 Ariz. 92, 39 P.2d 938 (1935); State ex rel Van Moss v. Sailors, 180 Wash. 51, 28 P.2d 280, 281 (1934).

[91] Lincoln Fire Ins. Co. of New York v. Barnes, 53 Ariz. 264, 88 P.2d 533 (1939); Schwartz v. Schwartz, 52 Ariz. 105, 79 P.2d 501 (1938); Sherlock v. Denny, 28 Wash. 170, 68 Pac. 452 (1902); Dearing v. Holcomb, 26 Wash. 588, 67 Pac. 240 (1901).

[92] *Quaere* as to tenancy by the entirety. *In re* Baldwin's Estate, *op. cit. supra* note 90; Henderson v. Henderson, 59 Ariz. 53, 121 P.2d 437 (1942); Collier v. Collier, 73 Ariz. 405, 242 P.2d 537 (1952); Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952; *In re* Trimble's Estate, 57 N.M. 51, 253 P.2d 805 (1953); Mullikin v. Jones, 71 Nev. 14, 278 P.2d 876 (1955).

[93] R.C.W. § 11.04.070 (1953):

> The right of survivorship by agreement or otherwise as a principle and as an incident of joint tenancy or of tenancy by the entireties is abolished. If partition is not made between joint tenants, the parts of those who die first shall not accrue

has largely abrogated the right of survivorship, it is felt that the tenancy by the entireties has also been superseded by the community property system.

A basic presumption indulged in by most community property jurisdictions is that property acquired and possessed by both spouses during the marriage is community property. It may be thought, therefore, that where one spouse transfers his or her interest to the other, the original interest of the transferee in the property ought to remain community, unless a statute provides otherwise or the parties evince a clear intention to the contrary. In fact, however, it is generally presumed that the intention was to change the character of such community property to separate property in its entirety, so that the property becomes the separate property of the transferee.[94] With the exception of Nevada, it may fairly

to the survivors, but descend, or pass by devise, and shall be subject to debts and other legal charges, or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common; Provided, That this section shall not apply in the following circumstances:

(1) As between husband and wife in dealing with community property as otherwise provided by statute.

(2) As to property and rights where the right of survivorship has been or may be revived by statute.

For cases where joint tenancy is still possible under the foregoing statute, see: *In re* Iver's Estate, 4 Wash. 2d 477, 104 P.2d 467 (1940) — transmutation of community funds into a joint tenancy in a commercial bank account where the deposit agreement with the bank specified that each depositor's interest was joint and several, and that the death of one should not affect the right of the other to withdraw the entire account. See R.C.W. § 33.20.030:

Savings may be received by an association in the name of two or more members as joint tenants with right of survivorship. In such case, payment to either member shall discharge the association from liability upon such savings account and, upon death of either of such joint tenants, the association shall be liable only to the survivor or survivors.

Tacoma Sav. & Loan Asso. v. Nadham, 14 Wash. 2d 576, 128 P.2d 982 (1942); Munson v. Haye, 29 Wash. 2d 722, 189 P.2d 464 (1948) — where clear, certain, and convincing evidence of transmutation is produced; *In re* Webb's Estate, 49 Wash. 2d 6, 297 P.2d 948 (1956).

[94] R.C.W. § 26.16.050 (1953); Shorett v. Signor, 58 Wash. 89, 107 Pac. 1033 (1910). See IDAHO CODE, § 32-906 (1947): "Real property conveyed by one spouse to the other shall be presumed to be the sole and separate estate of the grantee and only the grantor spouse need execute and acknowledge the deed or any other instrument of conveyance."

For a case rebutting this presumption, see Petition of Fuller, 63 Nev. 26, 159 P.2d 579 (1945), where the court held that property which the husband deeded to the wife presumptively became her separate property, but presumption was rebuttable by showing that property was paid for with community funds and was community property at the time of wife's death. See also Russo v. Russo, 80 Ariz. 365, 298 P.2d 174 (1956) — when the property is transmuted from community to joint tenancy, the interest of each spouse is owned as separate property; Main v. Main, 7 Ariz. 149, 60 Pac. 888 (1900); Beals v. Ares, note 85, *supra;* Baca v. Village of Belen, 30 N.M. 541, 240 Pac. 803 (1925). This result is not unlike that reached in non-community property jurisdictions as to interspousal transfer of a spouse's interest in tenancy by the entirety. See Hunt v. Covington, 145 Fla. 706, 200 So. 76 (1941) where a deed purporting to convey to the wife a husband's "one-half undivided interest" in an estate by the entireties was held to terminate the estate and lodge the unqualified fee simple estate in the wife.

be said that the community has no head or manager as far as the *disposition* of realty is concerned. Aside from this restriction on disposition, however, it would appear that the statutory requirement of joinder of the wife is merely a limitation, and that the husband's administrative control as business head or managing agent of the community real property is unimpaired.

In a 1944 New Mexico decision,[95] the court expressly declined to consider or decide whether, apart from disposition or encumbrance, the husband's power to manage the community realty is superior to that of the wife. However, in several earlier decisions,[96] the New Mexico court had referred to the husband as manager of the real estate of the community, except in the matter of executing deeds and mortgages, in which the wife must join.

In Washington, Idaho and Nevada, statutes give the husband control and management of the community realty.[97] The Arizona statute[98] provides that as agent of the community, the husband has the general management and control of the community personalty, but does not provide who shall have the management and control of the community realty, apart from the disposition thereof. However, the Arizona court has stated in no uncertain terms that the husband is the "head and master of the community," and there is little doubt that the court was referring to the husband's power to manage both personalty and realty.[99]

Failure to join the wife in all community realty transactions renders the conveyance or encumbrance void and ineffective in Arizona, Idaho, and New Mexico; and in Nevada, only with respect to the community

[95] Frkovich v. Petranovich, 48 N.M. 382, 151 P.2d 337 (1944).

[96] Fidel v. Venner, 35 N.M. 45, 289 Pac. 803 (1930); Davidson v. Click, 31 N.M. 543, 249 Pac. 100 (1926) — no legal restraint on husband's power as agent of community to acquire real property on behalf of the community; El Paso Cattle Loan Co. v. Stephens and Gardner, 30 N.M. 154, 228 Pac. 1076 (1924) — husband may subject all of the community real property to his debts created during coverture.

Cf. Clark, *Management and Control of Community Property in New Mexico,* 26 TULANE L. REV. 324 (1952).

[97] See for example R.C.W. § 26.16.030 (1953). See also Kane v. Klos, 50 Wash. 2d. 778, 314 P.2d 672 (1957) — husband has both management and control of community personal property; Hanley v. Most, 9 Wash. 2d 429, 115 P.2d 933 (1941) — where husband and wife disagree on a matter involving management of community property, husband's decision is controlling; Linton v. Linton, 78 Idaho 355, 303 P.2d 905 (1956); Willes v. Palmer, 78 Idaho 104, 298 P.2d 972 (1956) — by provisions of IDAHO CODE § 32-912 (1947), the husband has management and control of the community property, but his relationship toward it is in the nature of a trustee for the community. *Cf.* N.R.S. § 123.230 (1957).

[98] A.R.S. § 25-211 (1956).

[99] City of Phoenix v. State ex rel Harless, 60 Ariz. 369, 137 P.2d 783 (1943). See also Mortensen v. Knight, 81 Ariz. 325, 305 P.2d 463 (1956) — husband has dominance in management and control of the common property. Greer v. Goesling, 54 Ariz. 488, 97 P.2d 218 (1940) — husband has entire management of community property during coverture. Robbins v. United States, 5 F.2d 690 (1925) — husband during the marriage is given the management of the community real property.

homestead.[100] In Washington, this failure renders the transaction voidable. There it is held that compliance with the statutory requirement of joinder is essential to the validity of the instrument in the sense of it being without defect, but that non-compliance would not render it absolutely void.[101] It would seem that the policy of protecting the interest of the wife in community property is best implemented by the void construction, rather than the Washington voidable construction, since an instrument which is not an absolute nullity may be the foundation of an equitable charge by way of estoppel or ratification, as the Washington court has held.[102]

Thus, under the Washington rule, the protection of the wife is said to be accomplished by giving the wife and not the other party to the transaction the power of avoidance; where the wife has not joined, she may either accept or reject the husband's voidable action, without regard to the wishes of the transferee.[103] However, if the husband enters into a contract to sell or lease community real estate without his wife joining therein, and she either consents thereto then or subsequently, or ratifies his act, that is considered a sufficient participation within the statutory requirement of joinder in the conveyance. Neither the wife nor the community may thereafter disaffirm the contract or the husband's unilateral deed.[104] In numerous earlier Washington decisions[105] the court had indicated the invalidity of such a defective document. However, the power of ratification is inconsistent with the conveyance being absolutely void. Thus, in Washington, where the requirement of joinder of the wife in sales of community real estate dates back to the original

[100] Arizona: Greer v. Frost, 41 Ariz. 451, 20 P.2d 301 (1933); Cook v. Stevens, 51 Ariz. 467, 77 P.2d 1100 (1938); Rundle v. Winters, 38 Ariz. 239, 298 Pac. 929, 933 (1931). Idaho: Thomas v. Stevens, 69 Idaho 100, 203 P.2d 597 (1949); Childs v. Reed, 31 Idaho 450, 202 Pac. 685 (1921); Hart v. Turner, 39 Idaho 50, 226 Pac. 282 (1924). Nevada: First National Bank of Ely v. Meyers, 39 Nev. 325, 150 Pac. 308 (1915). New Mexico: Jenkins v. Huntsinger, 46 N.M. 168, 125 P.2d 327 (1942); McGrail v. Fields, 53 N.M. 158, 203 P.2d 1000 (1949); Mounsey v. Stahl, 62 N.M. 135, 306 P.2d 258 (1957).

[101] Bakke v. Columbia Val. Lumber Co., 49 Wash. 2d 165, 298 P.2d 849 (1956). *Cf.* McCurdy, *Insanity as a Ground of Annulment or Divorce in English and American Law*, 29 VA. L. REV. 771, 780 (1943) — "The concept of a voidable transaction is that which is productive of a particular legal effect, with a privilege in one party to void it."

[102] Hartman v. Anderson, 49 Wash. 2d 154, 298 P.2d 1103 (1956); Washington State Bank v. Dickson, 35 Wash. 641, 77 Pac. 1067 (1904); Bowman v. Hardgrove, 200 Wash. 78, 93 P.2d 303 (1939); Stephens v. Nelson, 37 Wash. 2d 28, 221 P.2d 520 (1950).

[103] Benedict v. Hendrickson, 19 Wash. 2d 452, 142 P.2d 326 (1943).

[104] Stephens v. Nelson, note 102 *supra; In re* Horse Heaven Irrigation District, 19 Wash. 2d 89, 141 P.2d 400 (1943).

[105] Hoover v. Chambers, 3 Wash. T. 26, 12 Pac. 547 (1887); Ryan v. Lambert, 49 Wash. 649, 96 Pac. 232 (1908); Spreitzer v. Miller, 98 Wash. 601, 168 Pac. 179 (1917); Hausen v. Hausen, 110 Wash. 276, 188 Pac. 460 (1920); Kaufman v. Perkins, 114 Wash. 40, 194 Pac. 802 (1921); Ballard v. Cox, 193 Wash. 299, 75 P.2d 126 (1938).

statute passed in 1869,[106] the most recent statute, which in general substantially follows the scheme of the original,[107] provides that the husband cannot dispose of community real property unless the wife participates in the transaction as co-grantor or through ratification.[108] Therefore, even if the wife has not signed the conveyance or the contract, it may yet be binding on her if she has sanctioned, approved or ratified it, or by her conduct has estopped herself from attacking its validity.[109]

In an early leading New Mexico case,[110] a *contract* to sell as distinguished from the conveyance of community realty was held unenforceable, unless jointly executed by both spouses (even though *contracts* for the sale of real estate are not within the express wording of the statute, and although as community manager, the husband had unquestioned authority to make all ordinary contracts). The rationale of the decision was that if a conveyance of community realty by the husband's sole deed would be void, then a contract to make such a transfer would likewise be ineffective, at least so far as specific performance is concerned. A later New Mexico case[111] held that the deed by the husband as sole grantor was absolutely void, and did not convey even his half-interest. In construing the statute, the court in that case said that the legislature did not dignify the effort at alienation under circumstances it had condemned as illegal, with the term "*conveyance made*," but used instead the term "conveyance *attempted* to be made". In a more recent New Mexico case[112] the attempt to distinguish between a conveyance or encumbrance and a contract to convey or encumber was successful. As a result, the contract to convey or encumber was not void but merely voidable. Thus, the *Henderson* case[113] modified the rule in New Mexico, as to contracts to convey, despite the fact that of all the statutory prohibitions against sole deeds and encumbrances, the New Mexico statute is the most emphatic.[114] In the *Henderson* case, a married man, posing as single, contracted for the sale of community real property. The purchaser took possession and made payments and improvements. Subsequently, the seller was divorced, and the contract was set over to his wife. It developed that she had made promises, upon which the purchasers relied, to give them a deed. It further appeared that she knew

[106] "An Act Defining the Rights of Husband and Wife" — LAWS OF WASHINGTON TERRITORY, 1869, p. 318.

[107] See particularly R.C.W. § 26.16.010, § 26.16.020, § 26.16.040, § 26.16.050 (1953).

[108] Ratification need not involve benefits or estoppel; it is just an election to affirm.

[109] See note 102, *supra*.

[110] Adams v. Blumenshine, 27 N.M. 643, 204 Pac. 66 (1922); Coppedge v. Leiser, 71 Idaho 248, 229 P.2d 977 (1951).

[111] Jenkins v. Huntsinger, 46 N.M. 168, 125 P.2d 327 (1942).

[112] Henderson v. Treadwell, 58 N.M. 230, 269 P.2d 1108 (1954).

[113] *Ibid.*

[114] N.M. STAT. ANN., § 57-4-3 (1953) — "Provided, further, that any transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect . . ."

or should have known of the existing contract and the amount then remaining unpaid thereon, and that the purchasers were improving the premises. The court held that in view of her knowledge of the foregoing, and by permitting the purchasers to remain in possession and improve the property, the wife was estopped in equity from asserting an otherwise valid defense of unenforceability of a contract. The court agreed that a contract for the sale of community realty executed by the husband alone would be unenforceable in a suit for specific performance, but maintained that, nothwithstanding, the contract would not be wholly void. On this tenuous reasoning, the court found a sufficient basis upon which to declare an equitable mortgage, and decreed specific performance. It is submitted that any distinction whereby a promise to convey is not as void as an attempt to convey is unsound. The statute voiding mortgages of community real property not executed by both spouses was enacted primarily to protect the wife against efforts by the husband to alienate her share of community real estate. However, this protective policy is best implemented by declaring wholly void *all* attempts to evade the statutory prohibition, since, according to familiar concepts, an estoppel cannot rest on a nullity.[115] Here, the court confined the ban against unilateral alienation to an attempted conveyance or encumbrance of the legal title only. But, any separation of the legal from the equitable estate, so as to permit either to be subject to the sole deed of one spouse, undercuts the legislative purpose in enacting the statute. However, specific performance of a contract for the *sale* of community real estate executed by the husband alone should not be decreed.[116] On the other hand, there is certainly no logical reason why specific performance of his contract to *purchase* realty on behalf of the community should not be granted, compelling the husband to go through with the purchase. It would be an unwarranted extension of the statutory mandate designed to prevent the husband's alienation of the wife's interest without her consent, and an unnecessary clog on the husband's powers as agent and manager to construe joinder statutes as extending to contracts to purchase realty, as distinguished from contracts to sell.[117]

[115] Dissenting opinion of Sadler J. in Henderson v. Treadwell, 58 N.M. 230, 269 P.2d 1108 (1954). Compare Thomas v. Stevens, note 100, *supra* . . . where the court said that "A contract to convey community real property which is not signed and acknowledged by both husband and wife is void; it is unenforceable, against strangers to the community, for want of mutuality, and the requisite mutuality must exist at the inception of the contract."

[116] Adams v. Blumenshine, 27 N.M. 643, 204 Pac. 66 (1922).

[117] Without joinder of his wife, the husband cannot release a mortgage on land, or release the community's rights as vendee under a contract to purchase, after valuable improvements at community expense have been placed on the land. [See Zeimantz v. Blake, 39 Wash. 6, 80 Pac. 822 (1905).] Moreover, a promise by the husband in which his wife does not join, furnishes no basis on which an equitable mortgage can be declared. [See El Paso Cattle Loan Co. v. Stephens and Gardner, 30 N.M. 154, 288 Pac. 1076 (1924)]. The Idaho Court in Williamson v. Wilson, 56 Idaho 198, 52 P.2d 132 (1936) has held that where a contract and deed are both parts of the

Moreover, an action in damages against the husband for breach of his executory contract to sell, trade, or exchange community realty will be sustained,[118] for, analytically, a joinder statute can have no application to prevent the husband from becoming *personally* responsible in damages. In other words, the husband should not be permitted to seek shelter behind a statutory immunity intended to protect the wife against his improvidence, and thus relieve himself of the consequences of his contractual obligations.[119]

In Nevada, by reason of the husband's sole right to control the community property, joinder of the wife in real estate transactions is not required, except in case of a homestead. The exception has been held to refer to a homestead "in fact", even though the homestead was not registered as required by law.[120]

In an earlier Arizona case,[121] the appellant unsuccessfully argued that the husband's interest in the property in question should be subjected to the operation of his sole deed as a conveyance, in case of the dissolution of the community by death or divorce. In other words, even though the conveyance itself was wholly void, the contract to convey was a valid contract, so far as the interest of the husband was concerned. Thus, in case the community were to be dissolved by death or otherwise at some later date, he would have a separate estate against which the contract could be enforced. The court emphasized that the statute did not say that the right of either spouse to encumber community realty should merely be *suspended* during the continuance of the community, but that they should not encumber it at all.[122]

In *Cook v. Stevens*,[123] the Arizona court held that even though a wife's failure to join in a conveyance of community realty renders the conveyance void, this does not prevent the statute of limitations from running against her when the grantee goes into possession with her knowledge and acquiescence. It has been argued that this latter propo-

same transaction, the joinder in the deed is the principal thing, and if that is complied with, a failure to join in the contract is not fatal. [See also Potter v. Conner, 38 N.M. 431, 34 P.2d 1086 (1934)].

[118] Conley v. Davidson, 35 N.M. 173, 281 Pac. 489 (1930) — That this position, though analytically sound, is inconsistent with the principal purpose of the joinder requirement, is discussed in connection with proposed legislation, *infra*.

[119] A.R.S. § 33-457 (1956), which declares that a fraudulent representation by a married person of ability to convey realty is a crime.

> A married person who falsely and fraudulently represents himself or herself as competent to sell or mortgage real estate, when the validity of the sale or mortgage requires the assent or concurrence of the wife or husband, and, under such representations, wilfully conveys or mortgages the real estate, is guilty of a felony.

[120] First National Bank of Ely v. Meyers, 39 Nev. 325, 150 Pac. 308 (1916).

[121] Rundle v. Winters, 38 Ariz. 239, 298 Pac. 929 (1931).

[122] The remedy of the purchaser against the husband is for breach of contract. See Jenkins v. Huntsinger (note 111, *supra*). *Cf.* note 134, *infra*.

[123] 51 Ariz. 467, 77 P.2d 1100 (1938).

sition indicates that the husband's unilateral conveyance is not really void, but merely voidable, at the instance of the wife.[124]. It would seem, however, on the facts of the case that when the Arizona court labelled the conveyance "*void*", it meant just that, for the adverse possession had no color of title, nor did it impute any validity to the deed.[125]

Since in the states other than Washington, an attempted separate conveyance of community property is a void act which cannot be corrected, it would seem entirely logical and in accordance with the basic policy of affording maximum protection to the wife, to require that the spouses must sign the same instrument, and that separate instruments will not suffice.[126] Inasmuch as the requirement of joinder of the wife in conveyances and encumbrances of the community real property is a comparatively recent development, coinciding with the growth of equal rights and the Married Women's Property Acts, and not a part of the Spanish civil law, there are no Spanish community property law sources to which we can turn for light on the rationale of holding separate instruments insufficient. It is submitted, however, that this is an instance where there is an analogous principle obtaining in the non-community states, based on the same considerations of legislative policy.

Under the Homestead Laws enacted in many states, an interest in the homestead property cannot be conveyed, encumbered or impaired in favor of a third person except by a single written instrument, executed and acknowledged personally by both husband and wife.[127] Although a case can be conceived in which both instruments might be intended to operate together as a single instrument, and where the separate consent of each is so intimately connected with the other as to amount to the joint consent of both,[128] separate and independent conveyances of the husband and wife will not suffice. Moreover, a subsequent execution by the wife of the husband's deed is not sufficient.[129] This non-community result as to homestead property has been expressly adopted by the Idaho Supreme court,[130] which held that under the statutes of the

[124] DE FUNIAK, Vol. 1, p. 331, n. 21. See Greer v. Frost, 40 Ariz. 551, 20 P.2d 301 (1933), applying the joinder requirement to *contracts* to convey realty.

[125] This is implicit in the court's finding an open, notorious, adverse and peaceable possession with knowledge of both spouses who made no objection thereto until long after the statute of limitations had run. The court expressly declined to discuss which particular statute of limitations was applicable, since the period of adverse possession found by the court was far greater than that of the longest time fixed by any statute as barring the right of recovery of real estate. Arizona has a shorter statute of limitations when adverse possession is claimed under color of title.
A.R.S. § 12-522, § 12-523, § 12-524, § 12-525, § 12-526 (1956). Had adverse possession depended on color of title, the conveyance could then have been classified as voidable, rather than void.

[126] N.M. STAT. ANN., § 57-4-3 (1953); Jenkins v. Huntsinger (note 111, *supra.)*

[127] Thomas v. Craft, 55 Fla. 842, 46 So. 594 (1908).

[128] 10 L.R.A. 200 (1891).

[129] Thomas v. Stevens, 69 Idaho 100, 203 P.2d 597 (1949).

[130] McKinney v. Merritt, 35 Idaho 600, 208 Pac. 244 (1922).

state then in force,[131] a sale or encumbrance of community property could be made only in the same manner in which the homestead could be conveyed.

In *Childs v. Reed*,[132] the same court held that the defect inherent in a deed to community property in which the wife has not joined cannot be cured by any subsequent consent of the wife or execution of a deed by her. If the deed is not signed by both husband and wife, it is "absolutely void," because the element of mutuality of obligation must exist from the inception of the contract.[133]

Under the present New Mexico law, where both spouses do not join in the same instrument, not only is the deed or mortgage ineffective to convey the community property,[134] but it does not convey even the interest of the spouse who executed the instrument.[135]

Although the Arizona court has held[136] that under the statute of that state, a conveyance of community real estate not joined in by husband and wife, is void in the primary meaning of that word — that is, wholly lacking in the legal effect of constituting a conveyance — there is one situation which, in a technical sense at least, rebuts the view that the instrument is absolutely void. This is the recognition of the doctrine of equitable estoppel.[137] Since estoppel cannot be founded on a nullity, it would appear that the defective instrument is properly classifiable somewhere in between absolutely void and voidable in the analytical sense. Nevertheless, in the cases holding the plaintiff wife estopped to assert an interest in the property, there was a conspicuous silence on this technical inconsistency.[138] Instead, the Arizona court based its holding on the prevailing trends in the development of community property law; that is to say that the doctrine of equitable estoppel applied just as much to a wife where community property rights are concerned,

[131] IDAHO CODE C.S. § 4666, now § 32-912 (1947).

> The husband has the management and control of the community property, except the earnings of the wife for her personal services and the rents and profits of her separate estate. But he cannot sell, convey or encumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or encumbered.

[132] 34 Idaho 450, 202 Pac. 685, 687 (1921). See also Thomas v. Stevens (note 129, *supra*).

[133] For a discussion of the same principle in an analogous statute of frauds, context in a non-community property state, see RAPPEPORT, *Contracts*, 20 UNIV. OF PITT. L. REV. 293, 296-299 (1958).

[134] Jenkins v. Huntsinger (note 111, *supra*); Miera v. Miera, 25 N.M. 299, 181 Pac. 583 (1919).

[135] McGrail v. Fields, 53 N.M. 158, 203 P.2d 1000 (1949) — sole deed does not convey even one spouse's interest. *Cf.* note 122, *supra*.

[136] Cook v. Stevens, 51 Ariz. 476, 77 P.2d 1100 (1938).

[137] Nickerson v. Ariz. Consolidated Mining Co., 54 Ariz. 351, 95 P.2d 983 (1939).

[138] Nickerson v. Ariz. Consolidated Mining Co., *ibid.*; Hall v. Weatherford, 32 Ariz. 370, 259 Pac. 283 (1927); Robinson *et ux* v. Merchant's Packing Co., Inc., 182 P.2d 87 (Arizona, 1947).

as it does to any other person, for with the emancipation of women, the status of marriage partook more of the nature of a partnership than that of master and servant, or guardian and ward.[139] The court has since reiterated its attitude that where property rights are concerned, the same rule of estoppel applies to a partner in the marriage relation as to a partner in any other relation. However, in dealing with the nature and extent of the doctrine of estoppel as against the invalidity of an encumbrance of community realty not signed by the wife, it was held that merely knowing of the encumbrance and accepting the benefits thereof does not in itself constitute an estoppel; there must also be some active or passive conduct which misleadingly injures the plaintiff.[140] It is interesting to note that even in Idaho, where the court has been most consistent in declaring absolutely void all instruments where one of the spouses did not join, whether it be in the actual conveyance or encumbrance, or in a contract so to do, the Arizona view has been followed.[141]

In this connection, the court in the New Mexico decision of *Henderson v. Treadwell*[142] attached significance to the supposed distinction between contracts for the sale of real estate, which are not expressly covered in the statute, and actual instruments of conveyance and encumbrance, which are accorded specific statutory treatment. This would seem, therefore, to point to the expanding application of the doctrine of equitable estoppel to conveyances of community realty where joinder is required.[143] Of course, the joinder requirement is never applied to a transfer of *separate property* by one spouse to a third person, because in none of the jurisdictions under consideration does the community managership include the separately held property of either spouse.[144]

Since a bare legal title may be held in trust without the trust estate becoming community property,[145] a husband or wife who is trustee of an express trust can make a valid conveyance of the trust's real property without joinder of the other spouse. There is no diversity on this point. An analogous concept has been applied in the solution of the purchase money mortgage situation where it has been held that the husband may

[139] Cosper v. Valley Bank, 28 Ariz. 373, 237 Pac. 175 (1925). *Cf.* McKAY, § 48-50, to the effect that equality between the spouses was not the object of the civil law property system. See DE FUNIAK, *Principles of Community Property,* § 1, for a contrary view.

[140] Maricopa Laundry Co. v. Levandoski, 40 Ariz. 91, 9 P.2d 1014 (1932).

[141] Kansas City Life Ins. Co. v. Harroun, 44 Idaho 643, 258 Pac. 929 (1927). Here the husband and wife signed a mortgage and they or their agent caused or permitted a false acknowledgment to be placed upon it. The community was estopped in equity from disputing the verity of the instrument as against a good faith purchaser for a fair consideration without notice who relied on its verity.

[142] See note 112, *supra.*

[143] *Ibid.*

[144] DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 112, pp. 314-322 (1943).

[145] Mill v. Sharder, 33 N.M. 55, 253 Pac. 758 (1927); Mapel v. Starriet, 28 N.M. 1, 205 Pac. 726 (1922); White v. Mayo, 31 N.M. 366, 246 Pac. 910 (1926); White v. Mayo, 35 N.M. 430, 299 Pac. 1068 (1931).

execute a valid purchase money mortgage without the wife's joinder.[146] Such cases are somewhat unique in reaching a sound result through the application of an orthodox Anglo-American common law concept to a community property transaction. In *Davidson v. Click*,[147] a husband, acting as agent for the community, purchased real property, and took a conveyance thereof in his own name for the benefit of the community. At the same time, and as part of the same transaction, he gave the vendor a purchase money mortgage for a part of the purchase price. The court upheld the purchase money mortgage given by the husband alone in good faith, despite the apparent inconsistency with the language of the statute,[148] which declares that husband and wife must join in all deeds and mortgages affecting community real estate. As a basis for arriving at their conclusion, the court adhered to the theory that the husband who takes legal title to realty for which he has not paid, does so as trustee for the benefit of the vendor until execution and delivery of a mortgage to secure payment of the purchase money.[149] To buttress its position, the court reasoned that beneficial title inures to the community when the mortgage is delivered and the trust ends. It is only then that the property is "acquired" unequivocally within the statutory use of the word. That is, the property has to be owned and possessed by the community before the statute relating to joinder in mortgages applies.

The purchase money situation is one where a persuasive analogy is to be found in non-community jurisdictions. There, although a wife must join in a mortgage of the "homestead" executed by the husband, a mortgage lien on property entitled to homestead exemption given to secure purchase money is perfectly valid, even though executed by the husband alone. It is submitted that this rule should be equally applicable where a husband, in order to acquire realty for the community, agrees that at the very moment of acquisition, the property should be subject to a lease in favor of the vendor.[150] Furthermore, even though the seller's agreement to lease the property is intended as an inducement to the buyer to purchase the property, the controlling element is that the lease is "entered into contemporaneously with the passing of title."[151]

[146] Davidson v. Click, 31 N.M. 543, 249 Pac. 100 (1926); Munro v. McAllister, 34 Idaho 638, 203 Pac. 286 (1921).

[147] Davidson v. Click, 31 N.M. 543, 249 Pac. 100 (1926).

[148] N.M. STAT. ANN. § 57-4-3 (1953).

[149] The reason most frequently given for the rule which makes a purchase money mortgage a 'favorite' of the law and gives it preference over claims or liens arising through the mortgagor, though prior in point of time, is that ownership of the land does not for a single moment rest in the purchaser, but merely passes through his hands and without stopping instantaneously revests in the mortgagee. Since the title does not rest in the mortgagor even for an instant, no lien of any kind can attach to it. See 47 A.L.R. 1025 (1927). Semble, this rationale is not applicable under a lien theory of mortgages.

[150] Morgan v. Firestone Tire and Rubber Co., 68 Idaho 506, 201 P.2d 976 (1948).

[151] So that the contract is entire; i.e., the covenants for purchase and sale and for leasing are inter-dependent.

Analytically, it is true that title must vest in the vendee before either the mortgage or the lease to the vendor is effective, because of the rule that seisin cannot be held in abeyance, and because one cannot have a mortgage or lease on his own freehold. Nevertheless, justice requires that any transaction in which a mortgage or lease is to be executed by the vendee as part of the purchase price should be beyond the ban of the joinder statute. Regardless of whether or not the court uses the trust theory employed in the Davidson case,[152] title, when it passes to the community, should be instantaneously subjected to the encumbrance.

In four out of the five states herein included which require joinder of the wife in all conveyances of community realty, all agree that the requirement is inapplicable to the *purchase* of a leasehold by the community. Concerning the question of whether or not the wife must join the husband in executing a lease of community realty or in alienating a leasehold interest which the community owns as lessee, however, there is a difference of opinion. This is so, notwithstanding the fact that the controlling statutes are substantially similar, although not identical in wording, and contain no specific reference to leases.[153] Broadly speaking, the joinder of the wife is required in Idaho both where the community is lessor and lessee; in Washington, the joinder is required only where the community is lessor, but not where the community is lessee; in Arizona, joinder is required where the community is lessor, but it is not known what would be the case if the community were lessee; in New Mexico, joinder is required only if the community is lessor of oil and gas leases, but it is not known what would be the case if the community were lessee of oil and gas leases.[154]

In all cases, the basic issue which finds the authorities divided is whether a leasehold interest is real or personal property.

In Idaho, the community's interest is regarded as realty, once the community has become lessee, with a right to possession and use of real property for a term of years. This is especially true where the community has made improvements upon the leased premises. The alienation of such an interest, therefore, is regarded in the same light as a transaction in which the community is a lessor of community realty, and the joinder of the wife is required in both instances. This requirement is applicable to material modifications of leases as well, which call for a writing joined

[152] See note 147, *supra.*

[153] See note 77, *supra.*

[154] Robinson *et ux* v. Merchants' Packing Co., Inc., 66 Ariz. 22, 182 P.2d 97 (1947); Fargo v. Bennett, 35 Idaho 359, 206 Pac. 692 (1922); Durant v. Snyder, 65 Idaho 678, 151 P.2d 776 (1944) — (Provisions pertaining to sale of merchandise in the lease were severable and hence enforceable); Coppedge v. Leiser, 71 Idaho 248, 229 P.2d 977 (1951); Terry v. Humphreys, 27 N.M. 564, 203 Pac. 539 (1922); Fidel v. Venner, 35 N.M. 45, 389 Pac. 803 (1930); Goddard v. Morgan, 193 Wash. 83, 74 P.2d 894 (1937) — (Part performance ineffective as against the wife to establish lease for full term.)

in by the wife, both as to signature and acknowledgment.[155] An argument can be made that at common law, the interest created by a lease for a specified period, no matter how long, was a "chattel real", and as such, properly classifiable as personal property.[156] The Idaho court's attitude on this point is that such an interest is within the scope of the joinder requirement.[157] Therefore, under this view, the community's position when it seeks to release or assign its interest as lessee is different from the situation when the community seeks to do the same thing with its interest as mortgagee. The latter transaction may be accomplished without the wife's signature, since all it involves is the repayment of a loan of community funds which are subject to the exclusive control of the husband by virtue of his powers as manager of the community personalty.

The Washington court, while in accord with Idaho when the community is the lessor, nevertheless distinguishes the situation when the community is the lessee, holding that the lessee's interest is only a chattel real; as such it is not community real estate within the meaning of the statute, but is characterized as personal property. The husband, acting alone as community manager, may surrender, assign, or otherwise dispose of it without the consent or joinder of the wife, in the same manner that he may dispose of chattels generally.[158]

In *Hood v. Fletcher*,[159] the Arizona court construed a leasehold interest as not being "realty" within the meaning of the joinder requirement; at the time of this decision, Arizona had amended its statute and extended the joinder requirement. The later statute included not only deeds and mortgages as specified in the former code,[160] limiting the cases requiring the wife's signature to deeds and mortgages, but transfers, conveyances, mortgages and incumbrances, as well as an indication that term leases would be added too. In the particular case under discussion, however, the earlier statute applied, for the later statute[161] took effect subsequent to the lease in question. Thereafter, the wording of the statute was changed again to read "conveyance or incumbrance".[162] The Arizona

[155] Intermountain Realty Co. v. Allen, 60 Idaho 228, 90 P.2d 704 (1939). But see Abbe v. Morrison, 64 Idaho 489, 134 P.2d 94 (1943), holding that a lease of community real estate for a period not exceeding one year is not such an "encumbrance" as is required by the statute to be in writing, executed and acknowledged by both husband and wife.

[156] 1 TIFFANY, REAL PROPERTY, pp. 7, 8; 96-8 (3d ed. 1939); 1 TIFFANY, LANDLORD AND TENANT, pp. 45-6 (1910).

[157] Although the common law term "chattel real" designates an interest which descends as personalty under the rules of devolution, and is therefore an interest of lesser dignity than a freehold estate, since it is an interest in and right to possession of real estate, it is within the scope of the joinder requirement. In Idaho, a leasehold interest is subject to the redemption statutes, if an execution is levied on it, and a declaration of homestead may be filed on it when it is occupied as a residence.

[158] Tibbals v. Iffland, 10 Wash. 451, 39 Pac. 102 (1895); American Sav. Bank and Trust Co. v. Mafridge, 60 Wash. 180, 110 Pac. 1015 (1910).

[159] 31 Ariz. 456, 254 Pac. 223, 225 (1927).

[160] Civ. Code, 1901, § 3104.

[161] REVISED STATUTES OF ARIZONA, 1913, § 2061.

[162] ARIZ. CODE ANN. § 71-409 (1939); A.R.S. § 33-452 (1956) reads "conveyed or incumbered."

court has construed this later provision as requiring a joinder in leases[163] when the community is the lessor. There has as yet been no occasion to decide the question when the community's interest was that of lessee.

On the other hand, New Mexico has construed a similar statute, so as to render valid a sole execution by the husband of a lease for years of community realty, irrespective of whether the community was lessee or lessor.[164] In *Terry v. Humphreys*,[165] the New Mexico court held that an oil lease of community real property, executed by the husband alone is void. This was in accord with the Idaho view that an oil and gas lease was a "conveyance" within a statute making joinder essential for the validity of an instrument conveying or encumbering community property.[166] However, in a subsequent case,[167] the New Mexico court expressly distinguished and limited this holding to cases involving oil and gas leases. The court said that so long as oil or gas was produced, there was an actual conveyance of real estate, because a part of the realty itself, in the form of the oil to be extracted, was to be sold. In *Fidel v. Venner*, on the other hand, the lease was merely for the use of the real estate for a definite term of years. A possible further distinction is that the Fidel case involved an ordinary lease of a definite term of years, whereas the Terry case involved an oil lease for an indefinite indeterminate period.[168]

In Nevada, joinder of both spouses is essential only in a conveyance or encumbrance of the homestead, and the statute is silent on the subject of leasing the homestead.[169] However, because of the very strong policy underlying the protection of homesteads, it appears certain that any lease of the homestead would require a joinder by both spouses.[170]

Ordinarily, the wife cannot, without the joinder or consent of the husband, dispose of the community property, even though title is in her name. However, the wife may be the agent of her husband or agent of the community with the husband's consent[171] and as such she may bind her husband either personally or as head of the community. This community sub-agency does not arise from the mere fact of the marriage relationship, but arises from express authority or from the conduct of the parties. Therefore, general principles of true agency apply, the wife's representative capacity being limited to matters inci-

[163] Robinson *et ux* v. Merchants' Packing Co., Inc., 66 Ariz. 22, 182 P.2d 97 (1947).
[164] Fidel v. Venner, 35 N.M. 45, 389 Pac. 803 (1930).
[165] 27 N.M. 564, 203 Pac. 539 (1922).
[166] Little v. Bergdahl Oil Co., 60 Idaho 662, 95 P.2d 833 (1939).
[167] Fidel v. Venner, 35 N.M. 45, 389 Pac. 803 (1930).
[168] See note 165, *supra*. See Clark, *Management and Control of Community Property in New Mexico*, 26 TULANE L. REV. 324 (1952).
[169] N.R.S. § 123.230 (1957). The undeclared homestead protected against unilateral alienation by the husband is a homestead in community property only. Mullikin v. Jones, 71 Nev. 14, 278 P.2d 876 (1955).
[170] Mullikin v. Jones, *ibid.*; First Nat. Bank of Ely v. Meyers, 39 Nev. 325, 150 Pac. 308 (1916).
[171] Munger v. Boardman, 53 Ariz. 271, 88 P.2d 536 (1939).

dental to the original agency. When she is representing the husband in this capacity, all her acts are those of the community. A transaction, even though originally not authorized by the husband, will be upheld, if subsequently ratified by him, or if his conduct estops him from denying authorization or ratification.[172] In addition, statutes in all the states provide for a power of attorney by either spouse, authorizing the execution of a conveyance or encumbrance on the other's behalf.[173] With regard to a power of attorney validly executed and acknowledged by the wife, the question has arisen as to whether or not the failure of the husband to refer to this power of attorney in the acknowledgment of a lease renders it void, or at least, voidable. In a Washington case, the non-disclosure of his representative capacity by the husband was deemed an improper acknowledgment, and such an omission was fatal.[174] That case involved a chattel mortgage under a statute[175] providing that a chattel mortgage is invalid, if it is not disclosed in the instrument itself, in the affidavit of good faith, or in the acknowledgment, that the executor is acting in a representative capacity. The same result, however, would undoubtedly be reached in the case of community realty. Non-disclosure in the instant case only required that the mortgage be viewed as any other instrument in which the wife has not joined. In view of

[172] Stevens v. Kittredge, 44 Wash. 347, 88 P.2d 536 (1939); Another situation where the community may be bound is illustrated by A.R.S. § 25-215 (1956):

> The wife may contract debts for necessaries for herself and children upon the credit of her husband. In an action to collect such a debt, the wife and her husband shall be sued jointly and the court shall decree that execution be levied first upon the common property, second upon the separate property of the husband, and third upon the separate property of the wife.

The wife's power to pledge her husband's credit for necessaries, which exists even apart from statute, is not based on principles of agency, but is merely the common law machinery for enforcing the husband's duty to support. The Arizona statute would seem to be a community property version of a modern Family Expense statute. See McCURDY, CASES ON DOMESTIC RELATIONS, pp. 680-690 (4th ed., 1952). Although the instant statute affords an adequate remedy against both husband and wife it fails to obviate a determination of what constitutes necessaries. *Cf.* R.C.W. § 26.16.205 (1953). See note 229a, *infra.*

[173] The Arizona and Idaho statutes are typical —
A.R.S. §33-454 (1956):

> Either husband or wife may authorize the other, by power of attorney executed and acknowledged in the manner as conveyance of real property to execute, acknowledge, and deliver, in his or her name and behalf any conveyance, mortgage or other instrument affecting the separate or community property or any interest therein, of the one making such power.

Idaho Code § 32-912 (1947):

> . . . provided, that the husband or wife may, by express power of attorney, give to the other the complete power to sell, convey or encumber said community property, either real or personal.

Cf. R.C.W. § 26.16.060 (1953).

[174] Pacific Finance Corp. v. Armstrong, 195 Wash. 524, 82 P.2d 117 (1938). An analogous case, in a non-community property jurisdiction is Miller v. Phillips, 157 Fla. 175, 25 So. 2d 194 (1947) where the husband's joinder was required for conveyances of a married woman's separate real property. Although the defendant wife held a power of attorney from her blind husband, she did not execute the contract in that capacity. Held: the husband's failure to join rendered the transaction void.

[175] Rem. Rev. Stat. §3780 (1932).

the fact that a non-joinder in Washington results in a voidable rather than a void instrument, the mortgage would thus be enforceable at the wife's election. A non-disclosure in the other states in the absence of estoppel would render the transaction wholly void.

To the general proposition that the wife has neither a managing nor a disposing power of any kind over community realty, there are, however, two well-recognized exceptions. The first exception, discussed above is that the husband may, by direct action or through estoppel or ratification, make the wife a sub-agent.[176]

The other exception is an emergency power in the wife when the husband is *non compos mentis,* sentenced to imprisonment for more than one year after conviction of a felony, is an habitual drunkard, has abandoned his wife and family without support, or is for any other reason incapacitated to manage the community property.[177] These situations are dealt with in varying degrees by statutes. As to the categories not included in the statutes of a given state, there is often decisional law.[178] The variations in treatment by statute and decision in the several jurisdictions are minimal, and a few illustrations will serve to indicate the trend of the law in this area. In any of the foregoing situations, the wife may petition the appropriate court that she be named head of the family, with the same power to manage, administer and dispose of the community property as is ordinarily vested in the husband.[179] As in all other civil actions, service of process and a recording of the judgment are all that are required when it is not alleged that the husband is *non compos mentis.* However, if it appears from the petition that the husband is *non compos mentis,* it is generally mandatory that the action be stayed until a guardian *ad litem* for him be appointed by the court.[180] In some states, when a husband is declared insane by a court

[176] See text at note 171, *supra.* Only where the wife obtains the husband's authorization to act as his sub-agent can she bind the community. Bristol v. Moses, 55 Ariz. 185, 99 P.2d 706 (1940). *Cf.* Lucci v. Lucci, 2 Wash. 2d 524, 99 P.2d 393 (1940); Short v. Dolling, 178 Wash. 467, 35 P.2d 82 (1934). R.C.W. (1953), § 26.16.060.

[177] See A.R.S. § 25-314 (1956):

> After an action for divorce is filed, the husband shall not contract any debts on account of the community property nor dispose of such property. Any alienation made by the husband after the action is filed shall be null and void if made with fraudulent intent to injure the rights of the wife.

[178] See *In re* Lundy's Estate, 79 Idaho 185, 312 P.2d 1028 (1957):

> Where reconciliation agreement between spouses contemplating divorce was fully executed by the parties and wife dismissed her suit and the parties lived amicably as spouses from the date of the reconciliation to the death of the husband, the property of the spouses was restored to its former status as community property.

[179] N.M. STAT. ANN. § 57-4-5 (1953) — Petition of Wife to Designation as Head of Community.

[180] N.M. Stat. Ann. § 57-4-6 (1953). Although not expressly stated in the statute, it would appear that the husband's mental incompetency must be of a type affecting his ability to manage and control the community property. "It is not necessary, however, that a person should have average mental capacity in order to make a

of competent authority, the wife becomes community manager by operation of law. In others, she must petition the court to be so appointed. When the wife has been appointed as head of the community by reason of the husband's insanity, she is clothed with all the power that the husband had[181] and in many instances she really has more power. Desertion, unaccountable disappearance, incarceration, enforced absence because of war are all cases where joinder is dispensed with, as distinguished from insanity, where it is not. The joinder statute thus applies to a conveyance by the wife while the husband is under guardianship, as well as it does while the husband is regarded as head of the community. Therefore, the wife cannot alienate or encumber community realty unless joined by the husband's guardian.[182] The guardian's joinder is as much a matter of his discretion as though he were one of the spouses. This probably explains the absence of legal process to compel the joinder of a recalcitrant guardian, which would defeat the main purpose of the guardianship.

The problem of incapacity of the community manager arises most frequently where the husband tires of his duties and responsibilities as head of the community and deserts the wife and family. Very often, the only property from which the wife can gain support for herself and children is the community real estate. Under these conditions, can she safely deal with such real estate, or to put the question from the standpoint of the husband's control of the community realty, to what extent does his desertion limit his right of management and control? In the absence of the husband, whether such absence be desertion or merely a temporary absence, even if no statute on the matter exists, the wife may have implied authority to take care of the community property and to make contracts respecting it for her own support, where no one

valid bargain. Mere weakness of mind or a condition approaching imbecility is not sufficient to constitute what the law regards as insanity . . ." WILLISTON, CONTRACTS, § 256, (Rev. Ed. 1936); WILLISTON, SALES, § 35 (Rev. Ed. 1948).

Unlike Spanish law, which provided for the appointment of a guardian for an insane or spendthrift husband (although ordinarily women were not favored by the law as guardians, the objection did not exist with respect to a mother as guardian of her child or a wife as guardian of her husband), under Anglo-American common law, the wife is not appointed guardian for the insane husband or vice-versa because of the joinder requirement.

Idaho Code, § 15-2001 (1947) — (Community) Real Property, Authority of sane spouse to sell, lease or mortgage. § 15-2002 — Grounds for selling, leasing or mortgaging:

(1) To raise money to satisfy a lien or charge on community real estate.
(2) To provide for the support and care of either the sane or insane spouse.
(3) For the support, care or education of minor child or children.
(4) For reinvestment in other property, if it shall appear that such a reinvestment would be for the best interest of both spouses and their minor children.

[181] Apparently she is the proper party to represent the community in litigation.

[182] In Frkovich v. Petranovich, 48 N.M. 382, 151 P.2d 337 (1949) notwithstanding that the husband had been adjudged incompetent, a mortgage of community real estate executed by the wife alone was invalid and subject to removal as a cloud on title.

else is left in charge of it.[183] However, if the absence is temporary, the wife's power of management and control would be limited to the extent necessary for her support and the preservation of "perishable" property.[184]

Idaho has provided by statute that when either spouse abandons the other, or is absent in excess of a specified period of time for any reason whatsoever,[185] the spouse or anyone who would be eligible to act as the absentee's administrator may petition for court appointment as trustee of the absentee's estate. The trustee appointed to take over or manage the estate has the authority to sell, lease or mortgage the community property for reasons listed in the statute and subject to court approval.

A wife who repudiates and abandons the marital relation ought to be deprived of her right to control the husband's power of disposition by withholding her signature to the conveyance or encumbrance. The nearest case in point is *Pendleton v. Brown*, where the deserting wife who was guilty of adultery was not permitted to maintain an action to set aside a deed of her husband to community property acquired subsequent to her leaving, upon the grounds of her non-joinder.[186] The insanity, desertion or disappearance of the wife presents the problem of expanding the husband's managerial powers and responsibilities where her joinder is necessary to conveyances or encumbrances of community realty (or of the homestead, as in Nevada). Recourse to the designated court may be necessary to have a guardian appointed, or to dispense with the wife's joinder.

The Washington court has held that the insanity or mental incapacity of the wife, affecting her ability to join in the execution of any instruments relating to the community property does not give the husband the right to dispose of the community realty without the wife's consent. The practice is to appoint a guardian for the insane wife to join in the

[183] Sassaman v. Root, 37 Idaho 588, 218 Pac. 374 (1923). It would seem that an abandonment by the husband is not only of the wife and family, but likewise of the common property, and by repudiating his duties, he relinquishes his exclusive power and right to control its management and disposition.

[184] Marston v. Rue, 92 Wash. 129, 159 Pac. 111 (1916). The court construed the term "perishable" loosely and held that the automobile was perishable. It is therefore not inconceivable that the court's reasoning might in a proper case be extended to include certain interests in realty.

It should be noted that this was in the absence of a court appointment and in the nature of an agency by necessity. This is analogous to an agency by necessity to care for the husband's perishable property in a non-community jurisdiction. See Evans v. Insurance Co., 130 Wis. 189, 109 N.W. 952 (1906).

[185] The order of priority of appointment is governed by the order of priority of the right of administration. The trusteeship is terminated either by reappearance of the absentee, or upon appointent of an executor of his last will or administrator of his estate.

[186] Pendleton v. Brown, 25 Ariz. 604, 221 Pac. 213 (1923). However, the court seemed to rely heavily on the wife's adultery and the fact that she was guilty of laches.

execution of the instrument.[187] Here again, the guardian's joinder is not compellable; obviously he cannot take over the management and control of the community realty, because under the statute, such management and control are given to the husband.[188] In Nevada, where with the exception of the homestead, the husband has the right to dispose of the community realty without the consent or joinder of the wife,[189] her insanity or disappearance would not restrict his right in any way.[190]

The foregoing discussion has dealt with situations in which the record title to the realty stands in the names of both spouses. In Washington, however, the fact that record title to the realty stands in the name of one spouse only and that the grantee or mortgagee acts in good faith without knowledge of the marriage relation may be the deciding factor. There, by statute[191] any bona fide purchaser of realty from the spouse in whose name the legal title stands of record will receive the full legal and equitable title, free and clear of all claims of the other spouse, if the other spouse has not filed a declaration of his or her interest in the property. But this theoretically applies only to such persons as purchase community realty without knowledge of the existence of the marriage relation, and who could not, with reasonable diligence have obtained such knowledge. In practice, the cases have made it so difficult to qualify as an "actual bona fide purchaser" that the only safe modus operandi is an assumption in all cases that real property interests are owned by married persons as tenants in community property, until the contrary is clearly shown.[192] On the other hand, where the marital relation has never been established or maintained within the state,[193] a wife cannot challenge the validity of a deed executed by the husband alone.

If, by the exercise of reasonable diligence, one who could have obtained knowledge of the existence of the marriage relation cannot be an innocent purchaser, a fortiori, one who knows at the time of making the contract of purchase that it constitutes a breach of the fiduciary

[187] Curry v. Wilson, 45 Wash. 19, 87 Pac. 1065 (1906); Merriman v. Patrick, 103 Wash. 442, 174 Pac. 641 (1918).

[188] Merriman v. Patrick, *ibid.*

[189] N.R.S. § 123.230 (1957).

[190] See Pierce v. Gibson, 108 Tex. 62, 184 S.W. 502 (1916) for a parallel case under a similar statute based on the same fundamental policy.

[191] R.C.W. § 26.16.095, § 26.16.100 (1953). The Washington statute specifically provides that failure of a husband or wife having an interest in the community realty to file a claim in the auditor's office within 90 days after recording of the legal title, will be deemed to have permitted a bona fide purchaser to receive full legal and equitable title.

[192] Campbell v. Sandy, 190 Wash. 528, 69 P.2d 808 (1937); Dane v. Daniel, 23 Wash. 379, 63 Pac. 268 (1900) — (wife failing to file claim not estopped to claim community interest in realty). The case also held that the husband and wife are both necessary parties in an action to foreclose a mortgage on their community real property.

Cf. Cross, *Community Property Law in Washington*, 15 LA. L. REV. 640, at 644 (1955).

[193] Campbell v. Sandy, *ibid.*; Daly v. Rizzutto, 59 Wash. 62, 109 Pac. 276 (1910).

duty of the husband to the community certainly cannot qualify as a bona fide purchaser.[194]

In Arizona and Idaho, where an innocent purchaser's contract is void for want of joinder by the vendor's wife, he is entitled to recover the purchase price, and the value of improvements on the land. In these states, the term "innocent purchaser" is interpreted very liberally and has been applied to a purchaser who was clearly aware of the community nature of the property, but was innocent of any connivance. In keeping with the policy of restoring the status quo as far as possible, the court held that the vendor had to return possession of any other premises given as security for payment of the purchase price.[195] Had the purchaser been an active wrongdoer, if permitted any recovery at all, he might have been limited to the traceable proceeds.[196]

Even when title to the community realty is in the name of the wife alone, authority to convey is still vested either in the husband alone or in both spouses. The question may then arise as to whether a bona fide purchaser from the wife acquires good title as against the husband or the husband's heirs. In Arizona, Idaho and Nevada, the wife has no legal capacity to make such a conveyance; it would seem, therefore, that in these three states where, without the husband's knowledge, the wife has alienated or encumbered community realty, title to which is in her name, the grantee is not protected against the husband, his heirs or devisees.[197] In New Mexico, however, a statute[198] provides in effect that whenever any real or personal property or any interest therein or encumbrance thereon is acquired by a married woman by a written instrument, the presumption is that title is thereby vested in her as her separate property. Such presumption is conclusive in favor of any person dealing in good faith and for a valuable consideration with a married woman, her legal representatives or successors in interest, regardless of any change in her marital status, after the acquisition of said property. By virtue of this statute, one who qualifies as a good faith purchaser from the wife occupies a considerably better position than the good faith purchaser from the husband under the Washington statute.

[194] Holyoke v. Jackson, 3 Wash. T. 235, 3 Pac. 841 (1882). *Cf.* Adams v. Black, 6 Wash. 528, 33 Pac. 1074 (1893).

[195] Colcord v. Leddy, 5 Wash. 791, 31 Pac. 320 (1892); Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634 (1910); Greer v. Frost, 41 Ariz. 551, 20 P.2d 301 (1933); Elliot v. Craig, 45 Idaho 14, 260 Pac. 433 (1927).

[196] On the general question of restoration of consideration to a wrongdoer, where the transaction is wholly void, see RESTATEMENT OF CONTRACTS, 1932, § 475, § 480, comment (b). *Cf.* RESTATEMENT OF RESTITUTION, 1937, § 66 on specific restoration as a condition of restitution when the transaction is voidable.

[197] The foregoing situation is clearly different from the case where the wife has been given power of management and disposition over community realty, when title thereto stands in her name, but this arrangement is unknown in the states which are the subject of this study.

[198] N.M. STAT. ANN. § 57-4-1 (1953). For similar California statute, see CALIFORNIA CIVIL CODE § 164 (1949).

In Washington, to qualify as a good faith purchaser, one must have no knowledge of the marriage relationship.[199] Of course, one facet of inquiry always open for consideration is whether the bona fide purchase is in fraud or injury of the husband.[200] If so, recovery may be had from the wife's interest in the community or her separate property.

In all the community property jurisdictions at the present time, the spouses may make gifts to each other from their separate estates or from their interests in the community property, in whole or in part. Such interspousal gifts are irrevocable, unless the right to revoke is expressly reserved. However their validity may be attacked for duress, undue influence, or fraud on either of the spouses or third person creditors.[201]

Some of the same considerations are involved in the husband's power to make a gift of the community realty to third persons. In four of the five states, the requirement of the wife's joinder in any conveyance or encumbrance of the community real property of course precludes a gift, unless the wife participates therein. In Nevada, however,[202] apart from the homestead exception[203] the husband's power of management of the community property includes the right to make gifts of it to third persons, without the consent of his wife. This right exists, absent a fraudulent intent to defeat the claims of the wife in such property, and where the gift is reasonable in proportion to the value of the entire community estate. This is in complete accord with Spanish community property law.[204]

[199] See note 191, *supra.*

[200] Stevens v. Kittredge, 44 Wash. 347, 87 Pac. 484 (1906); Harrah v. Specialty Shops, 67 Nev. 493, 221 P.2d 398 (1950); Travers v. Barrett, 30 Nev. 402, 97 Pac. 126 (1900); Harrah v. Home Furniture, 67 Nev. 114, 214 P.2d 1016 (1950).

[201] Beals v. Ares, 25 N.M. 459, 185 Pac. 780 (1919).

As to gifts resulting from the unconscionable conduct of the wife, see Trigg v. Trigg, 32 N.M. 296, 22 P.2d 119 (1933): "Conveyances procured by the exercise of undue influence may be set aside. Undue influence does not necessarily mean the implication or threat of physical injury." N.M. STAT. ANN. § 57-2-6 (1953): ". . . subject, in transactions between themselves to the general rules of common law which control the actions of persons occupying confidential relations with each other." Crawford v. Crawford, 24 Nev. 410, 56 Pac. 94 (1899); Gooding Milling and Elevator Company v. Lincoln County State Bank, 22 Idaho 468, 126 Pac. 772 (1912).

For the Spanish law on avoiding gifts due to overreaching, see NOVISIMA SALA MEJICANA, Title 4, Sec. 2a, No. 7.

[202] N.R.S. § 123.230 (1957).

[203] (And an additional exception relative to the earnings and accumulations of the wife and her minor children living with her, which are not of concern for present purposes.)

[204] The language of the Nevada statute is for all practical purposes an adoption of the Spanish-Mexican civil law. The following quotation is from the Spanish Community Property Law, as promulgated by the NOVISIMA RECOPILACION, Book 10, Title, Law 5:

> Of the ganancial properties, or acquired in the marriage: (by onerous as distinguished from lucrative title) — The properties which were gained, improved and multiplied during the marriage between the husband and the wife, which were not 'castrenses' (military goods where the community was not furnishing the soldier's maintenance) that the husband may convey the same during the marriage if he wishes, without license nor authorization of his wife, and that the

The case of *Nixon v. Brown*[205] squarely presented the question of whether the husband in Nevada can, during coverture, make a gift of a portion of the community realty without obtaining the written consent of the wife. Section 2160 of the Revised Laws of Nevada, then in force, was identical with the present statute hereinbefore cited.[206] It was argued that since the Nevada court had earlier refused to follow the California rule to the effect that the wife's interest in the community property was a mere expectancy[207] but held instead that it is a property interest though subject to the husband's control, the court therefore ought to follow this proposition to a logical conclusion and deprive the husband during coverture of the right or power to make a gift of the community interest without the wife's consent. The court, however, stressing that Nevada had practically adopted the Spanish-Mexican community property law, as it existed in California at the time of cession by Mexico,[208] and relying heavily on citations from the commentaries of the Spanish jurisconsults, held valid the husband's gift of a reasonable portion of the common realty without his wife's consent. The court also pointed out that no hard and fixed rule can be laid down as to just what proportion of the community interest would have to be included in the gift before it could be deemed unreasonable, but that this determination should properly be left for the decision of the court in each individual case. The court

> contract of conveyance shall be valid, unless it be proved that it was deceitfully made to defraud or injure the wife.

Cf. MCKAY § 314:

> In the absence of statute, the law furnishes but one limitation on the husband's power to convey community property; he must not convey with intent to defraud his wife, and this rule probably furnishes the test of his power to make gifts from the common fund; he must not make gifts with intent to defraud her.

Compare NEW MEXICO CODE (1915) § 2766, which, prior to later amendment provided:

> The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; Provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto, and: Provided, also, that no sale, conveyance or encumbrance of the homestead, which is then and there being occupied and used as a home by the husband and wife, or which has been declared to be such by a written instrument signed and acknowledged by the husband and wife and recorded in the county clerk's office of the county, and furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property shall be made without the written consent of the wife.

[205] 46 Nev. 439, 214 Pac. 524 (1923).

[206] N.R.S. § 123.230 (1957).

[207] *In re* Williams' Estate, 40 Nev. 241, 161 Pac. 741 (1916); Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228 (1897).

[208] See note 68, *supra.*

The court, in the instant case, said, ". . . There is no showing or statement that such funds were paid in fraud of the wife's rights, and no showing that the wife had not received even more than her share of the community property."

quoted from the concurring opinion in the Spreckels case[209] as announcing the correct rule, to the effect that if the husband makes a gift of community property, the transfer is good against him, and the only person who in any case has a right to complain is the wife, if she has been injured by it.

A New York decision[210] suggests a possible test of whether a particular gift is in fraud of the wife's rights; that is, the reasonableness of the gift, rather than the fraudulent intent as determinative of its validity. Under the test proposed, "in fraud of the wife's rights" would not necessarily rest upon fraud in fact, but on constructive fraud as a conclusion of law. The reasonableness of the gift may be inferred from a comparison of the relative values of the gift and of the common fund, and whether enough community property remains to satisfy the wife's legal claims. A court should, however, be permitted to consider all the circumstances surrounding the case which have a practical bearing on the disputed gift. In other words, reasonable gifts are authorized. Unreasonable gifts, even without actual intent to defraud are not authorized. In the absence of intentional fraud, the question is one of degree dependent upon the foregoing test.[211]

Statutory limitations on the husband's testamentary power of disposition must be included among the restrictions placed on his power of control. In Arizona and Washington, each spouse has an absolute right to dispose of his or her share of the community property by will.[212] In New Mexico, and until recently in Nevada, however, while the husband is empowered to dispose by will of his share of the community property, the wife who predeceases her husband has no such right. This would seem to be anomalous, inasmuch as the wife is said to have a present, equal and vested interest in the property; yet her share of the common property goes to the surviving husband without administration, subject to certain exceptions. In Nevada, where the husband abandoned the wife without such cause as would entitle him to a divorce, the wife's share of the community property became subject to her testamentary disposition in the same manner as her separate property. In New Mexico, the wife has testamentary power over such portion of the community property as may have been set apart to her by a judicial degree for her support and maintenance, and which thus, in effect, becomes her separate property. Until recently, in both states, if the wife fails to exercise her qualified powers of testamentary disposition, the property passes

[209] Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228 (1897). Compare Gristy v. Hudgens, 23 Ariz. 339, 203 Pac. 569, 572 (1922): ". . . The husband has a right to dispose of the personalty belonging to the community as he sees fit, provided that he does not, by his disposal of the same, thereby defraud his wife."

[210] Dickinson v. Lane, 193 N.Y. 18, 85 N.E. 818 (1908).

[211] *Cf.* GLENN, FRAUDULENT CONVEYANCES, §§ 269, 270 (Rev. ed. 1940). A.R.S. § 14-203 (1956).

[212] R.C.W. § 26.16.030, § 11.04.050 (1953).

to her heirs, exclusive of her husband.[213] By a recent statutory change in Nevada,[214] "upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof, goes to the surviving spouse . . ." subject to the following provisions: the husband shall retain the same managerial powers over community property as he did in his wife's lifetime. The property shall not be transferred to the wife's personal representative except as necessary to administer her will. Moreover, with regard to the community realty, unless the personal representative records a notice in the county where the property is situated within 40 days of the wife's death to the effect that the property, or an interest in it, is claimed by another person, the husband shall have full power to alienate or encumber the community real property and pass good title to another.[215]

In Idaho, the power of testamentary disposition is lodged equally in both spouses but is limited within boundaries having some of the earmarks of the Spanish law.[216] However, unlike the Spanish law, the disposition does not necessarily favor blood relatives. The property may be devised to the surviving spouse, the children, grandchildren or parents of the decedent or the surviving spouse, or to a combination of these persons. However, this restriction is inapplicable to any property in excess of the unencumbered appraised value of $25,000.[217]

[213] N.R.S. § 123.250, § 123.260 (1957). N.M. STAT. ANN. § 29-1-8, § 29-1-9 (1953):

> . . . provided, however, that the homestead set apart by the husband and wife, or either of them before his death, and such other property as may be exempt by law from execution or forced sale shall be set apart for the use of the widow and minor heirs, and if no minor heirs, for the use of the widow.

[214] N.R.S. § 123.250 (1957).

[215] N.R.S. § 123.260 (1957):

> 1. Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Title 12 of N.R.S.; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife, except to the extent necessary to carry her will into effect.
>
> 2. After 40 days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will.

[216] See note 63, *supra*.
Kohny v. Dunbar, 21 Idaho 258, 121 Pac. 544 (1912), recognizing the husband and wife as equal partners in the community estate.

[217] IDAHO CODE (1947) § 14-113:

> . . . provided that no more than one-half of the decedent's half of the community property may be left by will to a parent or parents, unless limited to an estate for life or less; and provided further that any part of decedent's share in excess of the unencumbered appraised value of $25,000 may be disposed of as testator sees fit.

An attempt has sometimes been made to extend the husband's power of testamentary disposition and control through application of the non-community doctrine of election. This doctrine originates in the non-community idea that the wife had a choice of either insisting on her dower right[218] or of taking under the husband's will in lieu of dower. The doctrine of election, however, ought not to be confused with the doctrine of renunciation in Spanish law, under which a widow was permitted to renounce her interest in community property and thereby relieve herself of all liability for community debts, even when such debts exceeded the total value of the community estate.[219] Nor should the concept of election be confused with a community property agreement, which, in effect, eliminates the testamentary power of each spouse as to his or her interest in the community property covered by the agreement. The application of the doctrine of election is anomalous in the community property area, because it indirectly enables a spouse to enjoy something more than the testamentary power over the community property granted by the statutes which limit his power to devise to his one-half interest. Thus, any attempt by one spouse to dispose by will of the other's community interest should be ineffective in the absence of a specific binding agreement. It is now universally conceded that the wife's title to her share of the community is a present vested interest. That being so, as it was under the Spanish law,[220] where the husband bequeaths or devises anything to his wife, such bequest or devise analytically is made from the husband's interest in the community or his own separate property, and has nothing whatever to do with the wife's share of the community property. Nevetheless, the doctrine of election, even though the testator's intention that it be applied is not unequivocally expressed obtains in New Mexico. In *Owens v. Andrews*[221] the widow was put to an election as to whether she would take a one-tenth interest in the husband's property, in lieu of "any interest she would have as my widow under the laws of the State of Texas[222] and the Territory of New Mexico". The court held that the widow was put to an election as to whether she would take her community interest under the statute, or under the provisions made for her in the will. Moreover, the court found that an election would be implied from the wife's conduct, although no express election was made by her, and the doctrine of estoppel would preclude revocation of the

[218] which, during the husband's lifetime, was only an inchoate interest.
[219] NOVISIMA RECOPILACION, Book 10, Title 4, Law 9.
[220] NOVISIMA RECOPILACION, Book 10, Title 4, Law 8.
[221] 17 N.M. 597, 131 Pac. 1004 (1913).
[222] Some of the property was located in Texas.
Cf. dissenting opinion of Roberts, J. in Colclazier v. Colclazier, 89 So. 2d 261 (Florida 1956), applying the doctrine of election to a will executed by a testator domiciled in New Mexico who died domiciled in Florida thirteen months later.

election. Apart from New Mexico, there is authority in Arizona and Washington, covering situations where the husband purports to dispose by will of the wife's share of the community property, and at the same time, makes a testamentary provision for her from his separate property or his share of the community property. In such cases, the attempted disposition of the wife's share is wholly ineffective to put her to an election, unless the testator's intention to dispose of property belonging to the wife is clearly expressed.[223] If this intention is not clearly expressed, the wife takes such bequest or devise, in addition to her share of the community property. These Arizona and Washington authorities indicate that the presumption of the testator's intention to dispose only of property which he owned and over which he had testamentary power of disposition, will always prevail unless some other intention is clearly expressed or implied in such manner as to leave no doubt of the donor's design.

The leading case is *La Tourette v. La Tourette*[224] which cited the Washington decisions with approval. In that case, the testator bequeathed to his wife for life "all of the property of which I may die possessed" and directed that "after her death all of said property of which she is then possessed shall go to her surviving children and to the issue of those that may be dead." The court held that the husband must be presumed to have known that the law permits him to dispose only of his half of the common property, and that his bequest to the wife of "all the property of which I die possessed" did not affect the wife's share of the common property. It is submitted that this refusal to presume a testator's intention to dispose of his wife's interest is the better view; the presumption that he intended to dispose of his moiety only is consonant with the spirit and philosophy of the "Community System of Matrimonial Gains".[225]

In all the community property states, no estate is allowed the husband as tenant by curtesy in the separate realty of the wife or in her share of the community realty, upon the death of the wife; nor has the wife an inchoate right of dower in the husband's separate realty of which he was seised during coverture or in his share of the community realty. In some of the states, there are statutes[226] to the effect that there is no

[223] La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426 (1914); Herrick v. Miller, 69 Wash. 456, 125 Pac. 974 (1912); Collins v. Collins, 152 Wash. 499, 278 Pac. 186 (1929).

[224] 15 Ariz. 200, 137 Pac. 426 (1914). *Cf.* Theall v. Theall, note 28, *supra.*

[225] REEVES, REAL PROPERTY, § 691.

[226] IDAHO CODE § 32-914 (1947); N.R.S. § 123.020 (1957); N.M. STAT. ANN. § 29-1-23 (1953); R.C.W. § 11.04.060 (1953).

R.C.W. § 11.04.060 Tenancy in dower and by curtesy abolished. "The provisions of R.C.W. § 11.04.020, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents; and take the place of tenancy in dower and tenancy by curtesy, which are hereby abolished."

by third persons dealing with the community[229] or by the community itself.

The doctrine of equitable estoppel would not be the solution. For, since it is confined within a relatively narrow compass, it is believed that even a full expansion of the doctrine within permissible bounds cannot be satisfactory.

The second anomaly is that by means of joinder, the husband may accomplish indirectly what he is prohibited from doing directly. Thus, the joinder requirement is of little avail in preserving the community realty, when the husband can, in the normal administration of community affairs, contract debts or subject the community to other claims without the concurrence of the wife. The foregoing is true even in Arizona and Washington, where the liability of community property is limited to the satisfaction of community obligations.[229a] In the other community property jurisdictions, this anomaly becomes particularly patent, for the property is subject not only to community debts, but to separate debts, as well.[230]

It has been suggested that the difficulties presented by this second anomaly can be rectified, and innocent third parties can be adequately protected by subjecting all community property, both real and personal, to joint control, through legislation.[231] It may be argued, in behalf of this proposed solution, that complete joint control is more in keeping with the realities of modern economic life and the equal status of women than the present joinder requirement. To the extent that joint control would eliminate the inconsistency of a contract made by a legally capable person who has no legal right to enforce it, joint control would

[229] However, in Washington, because the wife's failure to join does not render the conveyance absolutely void, but merely voidable, the power of avoidance for want of joinder is limited to the wife only. See note 103, *supra*. It is conceded that when contracts are entered into, there is no intention on the part of any of the parties to violate the law or the contract. The difficulty usually arises subsequently when a contracting party undertakes to relieve himself of a bad bargain, for the reason that the joinder requirement has not been met. Robinson *et ux* v. Merchants' Packing Co., Inc., 66 Ariz. 22, 182 P.2d 97 (1947); Thomas v. Stevens, 69 Idaho 100, 203 P.2d 597 (1949); Coppedge v. Leiser, 71 Idaho 248, 229 P.2d 977 (1951); De La Torre v. National City Bank of New York, 110 F.2d 976 (1st Cir. 1940).

[229a] That the community is only liable for community debts in Arizona and Washington, see A.R.S. § 25-216 (1956); R.C.W. § 26.16.200 (1953). Schramm v. Steele, 97 Wash. 309, 166 Pac. 634 (1917). Analogous to this liability is the common law rule that an estate by the entirety is only liable for the entirety's debts. See Newman v. Equitable Life Assur. Soc., 119 Fla. 641, 160 So. 745, 747 (1935), where the court held that real estate held by husband and wife by entireties could not, during the joint life of the spouses, be levied upon for the debts of one spouse.

Cf. R.C.W. § 26.16.205 (1953): "Liability for family support. The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or either of them, and in relation thereto, they may be sued jointly or separately." See note 172, *supra*.

[230] Spokane Merchants' Ass'n. v. Olmstead, 327 P.2d 385 (Idaho 1958); Guin v. MacAluso, 62 N.M. 375, 310 P.2d 1034 (1957).

[231] See note 227, *supra*.

be preferable to the present joinder requirement. For example, in some community property states, a wife may not sue in her own right in her business affairs, because the subject matter of her suit would be community property.[232] However, it is submitted, a system of joint control might give rise to impasses in cases of interspousal disagreements, and even where the spouses are in agreement, joint control might prove an untoward drag on the efficient management of community property.

Moreover, even conceding that the system of joint control implements the underlying policy of protecting the wife better than could any system of sole control by the husband, however comprehensive the safeguards, it must be recognized that joint control offers absolutely nothing effective by way of protecting innocent purchasers, when record title to the realty is in the name of one spouse. Statutes[233] aimed at protecting bona fide purchasers would fall short of accomplishing the desired objective, because of the obstacles interposed by decisional law which make it extremely difficult for one to qualify as a good faith purchaser for value. Even if subsequent statutes were to liberalize the test of a bona fide purchaser, the protection of innocent purchasers would be doubtful, because of the subjective element necessarily involved.[234]

Because of the above-mentioned inadequate protection of bona fide purchasers, and the implied drag on community management, it would seem that joint control is not the most desirable solution.

Is there, then, no solution to the anomalies posed by the joinder problem? It is submitted that there is such a solution.

It is possible to maximize protection of the wife, and at the same time avoid prejudicing the rights of innocent third party purchasers, through a legislative reinstatement of the husband's power of alienation of all community property, without the necessity of the wife's consent or participation in the conveyance. Such a restoration of the husband's power would properly be subjected to the following limitations and safeguards:

1. The husband can dispose of community property without the joinder of his wife, unless except as stated in sub-sections 2 and 3, (a) the disposition is for his own exclusive benefit, or (b) is for an inadequate consideration, or (c) is in a manner indicating an intent to prejudice the wife's rights.

[232] But see R.C.W. § 26.16.130 (1953):

> A wife may receive the wages of her personal labor, and maintain an action therefor in her own name and hold the same in her own right, and she may prosecute and defend all actions at law for the preservation and protection of her rights and property as if unmarried.

[233] R.C.W. § 26.16.095, § 26.16.100, § 26.16.110 (1953).

[234] Moreover, the remedy in an action for breach of an executory contract or on the covenants in the deed would rarely secure to an innocent purchaser the actual benefit sought in entering into the transaction.

2. Where the record title to community realty stands in the name of the husband alone, his sole lease, mortgage or conveyance, or contract to lease, mortgage or convey to a purchaser for value and in good faith without knowledge of the community nature of the property is valid and passes the full legal and equitable title free of all claim of the wife.[234a]
3. No disposition of property which has been declared by the husband and wife to be the family homestead by a written instrument signed and acknowledged by the husband and wife and recorded in the county clerk's office where the property is situated; and no disposition of the furniture, furnishings and fittings of the homestead, or of the clothing of the wife or minor children, shall be made without the written consent of the wife.

When the husband transgresses the foregoing restrictions, he would be acting in fraud of the wife as a matter of law. The wife ought then to be permitted to maintain an immediate action against him or against anyone who has participated with him in such wrongful use of the property, or against both of them together. This rule would be entirely in accord with the Spanish law, where the restriction prohibiting a wife from bringing suit without the consent of her husband[235] did not apply to the right of the wife to prosecute suits against her husband whenever the wife's estate in the community was imperiled by the husband's wrongdoing.[236] In addition to the foregoing legislation, there should

[234a] As against a bona fide purchaser, rather than against the husband. If the disposition comes within the restrictions enumerated in Sub-section 1, the wife has a claim against the husband. Sub-section 2 favors the bona fide purchaser over the wife because it is believed that ordinarily the husband's contracts regarding the real property of the community are made with the knowledge and consent of the wife. Therefore, on a net balance as between the wife and a bona fide purchaser, the equities favoring the latter are greater.

Moreover, the interests of the spouses in community property, the record title to which stands in the name of one of them alone, may be protected by a statutory provision similiar to R.C.W. § 26.16.100, permitting the spouse, within a specified time after the property is acquired by the community, to have his or her interest in the property made a matter of record ". . . with like effect as regards notice to all the world . . ." and thus prevent a purchaser from taking without notice. To enable a spouse to remove the cloud on title resulting from the filing of such a claim, a provision siimilar to R.C.W. § 26.16.110 can be inserted. This would permit removal of the cloud on title, either by the release of the party that filed it, or by a court when it appears that the property is the separate property of the person in whose name the record title stands. See note 191, *supra.*

[235] It would seem that no permission was required for wrongs to property or ex delicto actions generally, and that permission to sue or be sued on a contract was a mere formality, since the court could either compel the husband to grant permission or do it itself, and a judgment obtained without permission was valid and not subject to collateral attack. See note 40, *supra.*

[236] Chavez v. McKnight, 1 N.M. 147 (1857).

"This right of action by one spouse against the other when either was unjustly deprived of any property by the other and its return or reparation therefor was sought appears to have been well-settled for over 700 years (LAS SIETE PARTIDAS, Part 3, title 2, Law 5)."

also be a provision to the effect that the rents and profits derived from the separate property of the spouses are community property.[237] This would conform to the basic notion of the Spanish community property law that both partners to the marriage would wish to dedicate all of their onerous gains during coverture to the community. It would also eliminate the problem of apportioning the profits of a separate business between invested separate capital and the labor of the spouse who manages the business, which is of course community property.[238]

Balancing the restoration of sole control of the husband with safeguards in favor of the wife and innocent purchasers on the one hand, as against complete joint control coupled with legislation affording limited protection to the bona fide purchaser on the other, it is submitted that the former would be more effective in achieving the over-all objectives of greater stability in transactions between the community and third persons and maximum protection, for the wife, the community, and innocent third persons dealing with the community.

" 'Property' denotes that the wife had ownership of property earned during the marriage just as she did of her separate properties — Azevedo, COMMENTARIES TO NUEVA RECOPILACION, Book 5, Title 3, Law 7."

[237] See note 62, *supra.*

[238] See Lyons, *Development of Community Property Law in Arizona,* 15 LA. L. REV. 512, 515 (1955).

Criminal Jurisdiction Over Indian Country In Arizona

LAURENCE DAVIS*

On January 12, 1959, the Supreme Court of the United States reversed the judgment of the Supreme Court of Arizona in a civil action for a grocery bill of $81.22, and reportedly threw the state government into consternation.[1] The decision, *Williams v. Lee*,[2] was interpreted as creating a legal "no-man's land in which neither white men nor Indian knows his rights".[3] The enactment of an ordinance[4] by the Navajo Tribal Council on January 6, 1959, adopting as tribal law the existing law and order regulations of the Department of the Interior (applicable only to Indians) and assuming responsibility for their enforcement, was interpreted in the flash of impact of *Williams* as an effort of the Navajos to strip the county sheriffs and Arizona Highway Patrol of all authority within the Navajo Reservation.[5] The County Attorney of Apache County denounced the decision as "unprecedented" and "bad law".[6] The Arizona "attorney general's office" is reported to have expressed the opinion that *Williams v. Lee* took away from Arizona

* See Contributors' Section, p. 117, for biographical data.

[1] Arizona Republic, Jan. 14, 1959, p. 16, col. 1: "Officials in Uproar Over Indian Ruling".

[2] 79 Sup. Ct. 269 (1959), reversing 83 Ariz. 241, 319 P.2d 998 (1958).

[3] Arizona Republic, Jan. 14, 1959, p. 6, col. 1: The quoted editorial also contained the following statement: "This makes the Navajo — and every other — Indian reservation an extraterritorial enclave within the state of Arizona."

[4] Resolution No. CJA-21-59. Actually, this ordinance was a reenactment of one passed on July 18, 1958 (CJ-45-58), amended to overcome certain objections of the Commissioner of Indian Affairs. Its only purpose was to legalize a responsibility the Navajo Tribe has been exercising de facto some five years.

[5] Arizona Republic, Jan. 20, 1959, p. 6, col. 1: editorial, "Mounting Confusion".

[6] Apache County Independent-News, St. Johns, Arizona, Feb. 6, 1959, p. 1, col. 6; p. 8, col. 5. The Williams-Lee decision has apparently confused even federal officers in Arizona. The answer filed by the local United States Attorney on March 4, 1959, in Dailey v. United States, No. Civil 594 Prescott, D. Ariz., an action under the Federal Tort Claims Act, 28 U.S.C. § 2671-2680 (1952), for the wrongful death of a Navajo Indian child in a Bureau of Indian Affairs boarding school on the Navajo Indian Reservation at Leupp, Arizona, contains the following paragraph:

> [The defendant] Alleges that the injuries from which this claim arises were incurred on the Navajo Indian Reservation, a distinct, independent, political community, and a foreign country as that term is used in 28 U.S.C. 2680(k), and therefore defendant's sovereign immunity to suit has not been waived.

Indians "their status as citizens of the State and the rights the State has granted them on the presumption they were citizens".[7]

In reality, *Williams v. Lee* did not change the legal status of Arizona Indians one iota. It was an action in the state superior court by a licensed trader, not of the Indian race, against a Navajo couple to collect for goods sold on credit. Both the plaintiff trader and the defendant Indians lived on the Navajo Reservation, the sales took place there, and the summons was served upon the defendants there. Under these circumstances, the United States Supreme Court held the state court lacked jurisdiction. As authority for the holding, the Court relied principally on *Worcester v. Georgia*,[8] decided in 1832.

The Supreme Court has been severely and often intemperately and unjustly criticised in recent years for overruling prior decisions. In *Williams v. Lee*, however, strict adherence to ancient precedents caused the uproar. Obviously the local critics were ignorant of established American Indian law. This is understandable; the field is complex, and infrequently encountered in the average lawyer's practice even in Arizona, which has the nation's largest Indian population.[9]

This article is intended to help clear the smoke from one particular part of the field — the law of crimes involving Indians. In view of the frequent, and totally false, assertion that Arizona Indian reservations are legal no-man's lands and refuges for criminals,[10] this aspect of Indian law seems most urgently in need of exposition. Fortunately, it is also the one best settled by the statutes and cases. The present article examines the law with particular but not exclusive emphasis on Arizona — a state where Indian law, though greatly changed from what it was when *Worcester v. Georgia* was decided, is still less changed than in the majority of the states having Indian populations.

I. HISTORICAL BACKGROUND

Only by reviewing the history of the legal relations between the United States and the various Indian tribes now within its boundaries can the complicated and puzzling rules on legislative, judicial, and administrative jurisdiction over Indian country be seen to make sense. Stated as a code these rules seem arbitrary, but when approached as a

[7] Arizona Republic, Feb. 12, 1959, p. 12, col. 5.
[8] 6 Pet. 515 (1832).
[9] See table on page 100, *infra*.
[10] The Arizona Supreme Court itself helped give currency to this misconception;

> . . . if defendants' reasoning be sound, a white man could murder another white man on or off an Indian reservation and would be secure from Arizona prosecution so long as he could remain within the boundaries of a reservation.

See Williams v. Lee, 83 Ariz. 241, 244, 319 P.2d 998, 1000 (1958).

historical development, they become intelligible and reveal themselves to be practical, if not perfect, methods for solving important problems of conflict of community political rights.

Prior to the coming of the whites to the New World, the Indian tribes were independent nations. Merely by being included in the boundaries of the United States, by action to which the Indian tribes were not parties, these tribes, in the view of the white man's international law, lost their authority to have relations with any other civilized nation; but they did not thereby lose any of their other governmental powers.[11] By what the cases call "conquest", but which in many instances was really engulfment, the United States assumed a right to make and enforce laws in derogation of the remaining governmental powers of the Indian tribes. Until 1871, this right was usually exercised by treaty with individual tribes, but since that time it has been done by acts of Congress, many of which, however, to this day are actually ratifications of agreements negotiated between the United States and the Indians.[12]

However, no federal law to date has abolished all the governmental powers of every American Indian tribe. Various federal laws on a piecemeal basis have abrogated some of these powers, usually not expressly, but by necessary implication from assumption by the United States of a particular governmental power over Indians, previously possessed exclusively by their tribe. In any event, the present-day jurisdiction of Indian tribes derives principally from the tribes' own unextinguished sovereignty and not from federal delegation; federal law must be looked to, not for the sources of tribal authority, but for its limitations.[13]

On the other hand, state jurisdiction over Indians within "Indian country" — a term we will define below — derives exclusively from federal grants of authority. The "whole intercourse" between the Indian tribes and the other people of the United States is by virtue of the Commerce Clause of the Federal Constitution (Article I, Section 8, Clause 3) vested in the federal government.[14] Such authority as the states have over Indians within Indian country was granted by Congress; by becoming parties to the United States Constitution, the original states

[11] Cherokee Nation v. Georgia, 5 Pet. 1 (1831); Worcester v. Georgia, 6 Pet. 515 (1832). See also Johnson v. M'Intosh, 8 Wheat. 543 (1823).

[12] REV. STAT. § 2079 (1875), 25 U.S.C. § 71 (1952); cf. Dick v. United States, 208 U.S. 340, 359 (1908); COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 66, 67 (1941) (hereinafter cited as COHEN). A second edition of COHEN was published, by the Office of the Solicitor, United States Department of the Interior, in 1958 under the title FEDERAL INDIAN LAW. The new edition contains valuable discussion of recent developments in Indian law, but makes such changes in the original text for reasons of policy that its authority as a legal treatise is undermined, e.g. p. 396, Indian tribes redefined as municipalities. Accordingly, references in the present article are to the original edition of 1941.

[13] COHEN, 122; Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89, 94 (8th Cir. 1956).

[14] Worcester v. Georgia, 6 Pet. 515, 561 (1832).

lost whatever jurisdiction of this nature they may have possessed, and the states subsequently admitted to the Union never had such jurisdiction. Although the fact that federal jurisdiction over Indians derives from the commerce clause rather than Article I, Section 8, Clause 17, has occasionally been overlooked by state judges (see e.g., dissenting opinion in *State ex rel. Irvine v. District Court*),[15] it is well established that no cession of jurisdiction by the state legislature, such as is required to establish exclusive federal jurisdiction over enclaves reserved for forts, magazines, arsenals, dock-yards and other needful buildings, is necessary to enable Congress to assume exclusive jurisdiction over Indians.[16]

The extent to which Congress has delegated criminal jurisdiction over Indians to the states is discussed in a subsequent section of this paper.[17]

Thus, in discussing jurisdiction over Indians in Arizona, we see that three legitimate sovereignties, each having legislative, administrative, and judicial powers, are involved: the Indian tribe, the federal government, and the state. The Indian tribe originally had exclusive jurisdiction over its members. The federal government has assumed some of this jurisdiction and delegated some of it to the state; what remains is still vested in the tribe.

II. TERRITORIAL LIMITS OF FEDERAL, TRIBAL AND STATE CRIMINAL JURISDICTION OVER INDIANS —"INDIAN COUNTRY" DEFINED

At this point it is necessary to define the territory in which the federal, tribal and state jurisdictions can operate. As a general rule, a political community can enforce its criminal laws only against persons found within its territorial limits, although it can designate acts done by its citizens outside its borders as crimes, subjecting them to punishment upon their return home.[18]

A. Federal territorial jurisdiction.

Commerce with the Indian tribes means commerce with the individual Indians composing the tribes.[19] Consequently, by virtue of the commerce clause, the federal government *can* act on the persons of members of American Indian tribes anywhere in the United States; and, until 1953, did so by prohibiting absolutely the sale of liquor to tribal

[15] 25 Mont. 398, 239 P.2d 272, 282 (1951).
[16] Donnelly v. United States, 228 U.S. 243, 269 (1913); United States v. McGowan, 302 U.S. 535 (1938); Board of Commissioners v. Seber, 318 U.S. 705 (1943); Browning v. United States, 6 F.2d 801 (8th Cir. 1925), cert. denied, 269 U.S. 568 (1925).
[17] See below, Part IV, "State Criminal Jurisdiction".
[18] BEALE, THE CONFLICT OF LAWS §§ 425.1, 426.1.
[19] United States v. Holliday, 3 Wall. 407, 417 (1866).

Indians. See 18 U.S.C. § 1154 (1952) — modified by the act of August 15, 1953,[20] so as to be no longer applicable to transactions outside "Indian country". Congress, however, has now voluntarily restricted the territory in which crimes committeed by or against Indians are subject to prosecution in federal courts to "Indian country", which is defined in 18 U.S.C. § 1151:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian Country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. As amended May 24, 1949, c. 139, § 25, 63 Stat. 94.

The quoted statute means just what it says.[21] The authority of Congress to define the area in which it chooses to exercise jurisdiction over members of Indian tribes does not derive from federal or Indian ownership of land.[22] Thus, islands of fee patent land within the exterior boundaries of Indian reservations are embraced in the definition of Indian country, and federal jurisdiction over crimes committed by or against Indians on such islands is the same as on lands within the reservations held under Indian title.[23] Similarly, crimes involving Indians committed on rights of way running through Indian reservations are within exclusive federal jurisdiction.[24] This is true regardless of whether the right of way is owned in fee simple or is a mere easement.[25]

[20] 67 STAT. 586, 18 U.S.C. § 1161 (Supp. V, 1958).

[21] State *ex rel.* Bokas v. District Court, 128 Mont. 37, 270 P.2d 396 (1954).

[22] United States v. Thomas, 151 U.S. 577, 585 (1894); Donnelly v. United States, 228 U.S. 243, 269 (1913); Browning v. United States, 6 F.2d 801 (8th Cir. 1925), cert. denied, 269 U.S. 568 (1925).

[23] Guith v. United States, 230 F.2d 481 (9th Cir. 1956); Williams v. United States 215 F.2d 1 (9th Cir. 1954), cert. denied, 348 U.S. 938 (1954); State *ex rel.* Irvine v. District Court, 125 Mont. 398, 239 P.2d 272 (1951); Application of Andy, 49 Wash. 2d 449, 302 P.2d 963 (1956); see note 21, *supra.*

[24] Application of Konaha, 131 F.2d 737 (7th Cir. 1942); *In re* Fredenberg, 65 Fed. Supp. 4 (E.D.Wis. 1946); Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958); State v. Begay, 63 N.M. 409, 320 P.2d 1017 (1958), cert. denied, 357 U.S. 918 (1958).

[25] Memo. Solicitor, Dept. of Interior, July 3, 1940 — quoted in COHEN, 358, n. 9. The rule was different prior to the act of June 28, 1932 (47 STAT. 336). See Clairmont v. United States, 225 U.S. 551 (1912); *Ex parte* Tilden, 218 Fed. 920 (C.D. Idaho 1914).

B. Tribal territorial jurisdiction.

Since the Indian tribes have lost their power over international relations to the government of the United States, determination of the territorial limits of their jurisdiction is properly a question of federal law. It is plausible to assume that they have administrative and judicial jurisdiction — the power to make arrests and hold trials — within Indian country as this term is defined in 18 U.S.C. § 1151. The law and order regulations of the Bureau of Indian Affairs state, 25 C.F.R. § 11.2 (a)-(c):

> (a) A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in §§ 11.38-11.87NH, when committed by any Indian, within the reservation or reservations for which the court is established, provided that such court on the Hopi Reservation shall also have jurisdiction to enforce against members of the tribe within the Hopi Reservation the ordinances passed by the Hopi tribal council which prohibit offenses against the peace and welfare of the tribe committed by such members off the reservation.
>
> (b) With respect to any of the offenses enumerated in §§ 11.38-11.87NH, over which Federal or State courts may have lawful jurisdiction, the jurisdiction of the Court of Indian Offenses shall be concurrent and not exclusive. It shall be the duty of the said Court of Indian Offenses to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation, for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender.
>
> (c) For the purpose of the enforcement of the regulations in this part, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction, and a 'reservation' shall be taken to include all territory within reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes.

The Solicitor of the Department of the Interior in an opinion dated April 27, 1939 (quoted at length in COHEN 359-362) reasoned that 25 C.F.R. § 11.2 (c) is correct in stating that the tribe has criminal jurisdiction over its members on fee-patent lands within the exterior boundaries of its reservation. Enactment of 18 U.S.C. § 1151 in 1948 seems to confirm this opinion. There seems to be no reported case on this point.

Assuming that an Arizona Indian tribe has authority to arrest and try its members within the exterior boundaries of its reservation, it does not necessarily follow that its legislative jurisdiction is confined to the same boundaries.[26] 25 C.F.R. § 11.2 (a) shows that the Hopi Tribe

[26] See note 18, *supra.*

claims the right to punish its members for misconduct occurring off their reservation, provided such members return to the reservation for trial. The Navajo Tribe claims and in fact exercises legislative jurisdiction over the so-called "checkerboard" area of New Mexico — a large area ceded by the Navajo Tribe to the United States by the Treaty of June 1, 1868 (15 STAT. 667), where some 20,000 Navajos still live, on public domain, allotments, and tribally-purchased trust land. In addition, Navajo police actually patrol the checkerboard area, make arrests there, and transport prisoners from there to Navajo courts for trial.[27]

To determine the borders of Indian reservations in Arizona, an almost indigestible mass of acts of Congress and executive orders must be consulted. To locate Indian allotments, the tract books of the Arizona State Office of the Bureau of Land Management must be consulted. County assessors' records also usually locate Indian reservations and allotments, but the assessors' books represent only the assessors' information and are not authoritative for this purpose. The treaties, acts of Congress and executive orders establishing Indian Reservations actually are, moreover, only declarations that the United States holds all or some land within the boundaries described for the occupation and use of the Indian tribe or tribes named in the particular act or order. In other words, the acts and orders are of their own force only instruments affecting rights in land, like deeds and leases.[28] They are definitions of territorial jurisdiction only to the extent that other federal law, either statutory or decisional, makes them so.

C. State territorial jurisdiction.

The criminal jurisdiction of a State *prima facie* extends to all the area within its boundaries; but the Federal Constitution and laws oust the state of much jurisdiction within Indian country. The State of Arizona has jurisdiction to punish Indians for violations of state law committed outside of Indian country to the same extent that it has jurisdiction to punish non-Indians.[29] The substantive extent of state jurisdiction within Indian country is discussed in Part IV of this paper.

III. FEDERAL CRIMINAL JURISDICTION

Although tribal criminal jurisdiction existed first, it has been limited

[27] See resolution of the Navajo Tribal Council adopted December 18, 1945. NAVAJO TRIBAL COUNCIL RESOLUTIONS, vols. I and II, p. 210, and approved by the Commissioner of Indian Affairs on July 19, 1946. This resolution has received at least tacit approval from the Governor of New Mexico, because it relieves the state of heavy expenses for policing the checkerboard area.

[28] Cf. Tooisgah v. United States, 186 F.2d 93, 102 (10th Cir. 1950 — dissenting opinion).

[29] Pablo v. People, 23 Colo. 134, 46 Pac. 636 (1896); cf. *Ex parte* Tilden, 218 Fed. 920 (C.D. Idaho 1914).

to such extent by assumptions of jurisdiction by the federal government, that the overall jurisdictional status of Indian country in Arizona will be better understood by discussing federal jurisdiction first, and thereafter discussing the jurisdiction that has been left to the tribes.

18 U.S.C. § 1152 (1952) states:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152 is part of the revised Criminal Code of the United States enacted on June 25, 1948 (c. 645, 62 STAT. 683, 757); but merely carries forward sections 2145 and 2146 of the Revised Statutes (1875), and the act of February 18, 1875 (18 STAT. 318), which inserted the exception concerning crimes committed by one Indian against the person or property of another Indian.

Actually, the Criminal Code of 1948 contains no definition of "place within the sole and exclusive jurisdiction of the United States", and has no separate body of sections setting out the criminal code applicable to such places. The phrase "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7 (1952) as including:

> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . .

The sections of the Federal Criminal Code defining certain acts committed on such lands as crimes are those which 18 U.S.C. § 1152 makes applicable to the Indian country.[30] Such sections are scattered throughout the code, and usually begin with the phrase, "Whoever, within the special territorial and maritime jurisdiction of the United States . . ." In addition, there is a catch-all section (18 U.S.C. § 13), popularly called "The Assimilative Crimes Act", which has been held applicable to the Indian country.[31] Of course, federal criminal laws applicable to all persons in the United States without regard to the jurisdictional status

[30] Guith v. United States, 230 F.2d 481 (9th Cir. 1956).
[31] United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950).

of the land on which committed are also applicable to Indians, both inside and outside of Indian country.[32]

The intent of Congress in section 1152 of the Criminal Code of 1948, *supra*, would seem perfectly clear, viz., that the federal courts have exclusive jurisdiction over all crimes committed in Indian country except those committed by one Indian against another, and those over which exclusive jurisdiction is secured by treaty to a particular Indian tribe.[33] The United States Supreme Court, however, in two cases, *United States v. McBratney*,[34] and *Draper v. United States*,[35] read a further exception into the language which now appears in 18 U.S.C. § 1152: the Court held that a crime committed in Indian country by one non-Indian against the person of another non-Indian is within state jurisdiction, and that the exception applies even though the state enabling act and constitution contain an express disclaimer of jurisdiction over Indian land. The *McBratney* and *Draper* decisions appear to be based on now discredited theories of states' rights; but they appear too well established in federal jurisprudence to be overruled.[36] These cases deal with crimes by non-Indians against the persons of other non-Indians, but they are undoubtedly also applicable to crimes by non-Indians against the property of other non-Indians.

Accordingly, crimes committed within Indian country in Arizona are within the jurisdiction of the federal courts, with these exceptions:

(1) Crimes committed by Indians aginst the person or property of other Indians (there is an exception to this exception; see below).

(2) Crimes committed by an Indian who has already been punished for his crime under the local law of the tribe.

(3) Crimes committed by non-Indians against the person or property of other non-Indians.

The exception to exception 1 above, that is, the cases in which the federal courts have jurisdiction over crimes committed within Indian country by one Indian on the person or property of another Indian, is contained in 18 U.S.C. § 1153 (1952), commonly called "The Ten Major Crimes Act", which is discussed in subsection D, below.

Stated affirmatively, federal courts have jurisdiction over crimes committed in Indian country in Arizona in the following classes of cases:

(a) Crimes committed by an Indian against the person or property of a non-Indian (see subsection A below).

[32] See Bailey v. United States, 47 F.2d 702 (9th Cir. 1931) — a case arising in Arizona; Head v. Hunter, 141 F.2d 449 (10th Cir. 1944).

[33] COHEN 365, states that there are no such treaty stipulations now in force. It is certain that this exception has no application in Arizona.

[34] 104 U.S. 621 (1882).

[35] 164 U.S. 240 (1896).

[36] See People *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

(b) Crimes committed by a non-Indian against the person or property of an Indian (see subsection B below).

(c) Crimes committed either by an Indian or a non-Indian which have no personal or proprietary victim. (See subsection C below).

(d) Certain specified crimes committed by one Indian against the person or property of another Indian. (See subsection D below).

These four classifications of federal criminal jurisdiction over Indian country in Arizona are discussed in detail in the following subsections of this paper. Also discussed below is the question of whether the federal jurisdiction is exclusive or concurrent in each classification.

A. Crimes committed by Indians against the persons or property of non-Indians in Indian Country.

Such offenses fall squarely within the language of 18 U.S.C. § 1152. Federal courts have jurisdiction for trial of persons accused of them, and the state courts do not.[37]

All crimes committed by Indians within Indian country, however, whether whites or Indians are the victims, or whether the crimes have no victims, are within tribal jurisdiction. 18 U.S.C. § 1152 provides in part as follows:

> This section shall not extend . . . to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . .

Consequently, where federal jurisdiction exists over crimes committed by Indians in Indian country, it is concurrent with tribal jurisdiction, at least where one of the ten major crimes is not involved, although exclusive of state jurisdiction. *United States v. Whaley,* 37 Fed. 145 (S.D. Cal. 1888) holds that Indian tribes do not have concurrent jurisdiction with the federal courts over murder. It is questionable whether this case is good law; certainly tribal courts have gone on punishing larceny even though it is brought under federal jurisdiction by 18 U.S.C. § 1153. Under 25 C.F.R. § 11.2 (b), the concurrent tribal jurisdiction is not to be exercised unless the federal authorities decline to prosecute. In actual practice, federal courts assume jurisdiction over serious crimes committed by Indians against whites, and tribal courts take jurisdiction of petty offenses.

[37] *Ex parte* Pero, 99 F.2d 28 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939); State v. Pepion, 125 Mont. 13, 230 P.2d 961 (1951); State *ex rel.* Irvine v. District Court, 125 Mont. 398, 239 P.2d 272 (1951).

B. Crimes committed by non-Indians against the persons or property of Indians.

Such crimes also fall within the purview of 18 U.S.C. § 1152.[38]

Whether by federal law or by self-limitation (see Part V below), tribal courts in Arizona do not have any concurrent jurisdiction in such cases.[39]

Theoretically, there would seem to be no constitutional barrier to state courts' taking concurrent jurisdiction. All native-born Indians, since passage of the act of June 2, 1924 (c. 233, 43 STAT. 253), have been citizens of the United States, and consequently, by virtue of the 14th Amendment, also citizens of the state wherein they reside. Although it has been decided that the grant of citizenship does not remove the Indian from federal jurisdiction,[40] or subject him to state jurisdiction as a defendant,[41] it does not follow that the state cannot protect its Indian citizens by punishing non-Indians who have committed crimes against them within the Indian country.[42] Of course, the judgment of a state court in such a case would not bar a subsequent federal prosecution of the same defendant for the same act.[43] However, dictum to the effect that Congress intended to occupy the field of punishing crime by non-Indians against Indians in Indian country is very strong.[44] Therefore, a federal court would probably hold that state prosecution of non-Indians in such circumstances is precluded by federal statutes, notwithstanding that it would not be barred by the Constitution in the absence of legislation.[45]

United States attorneys and United States judges are reluctant — and probably for very adequate reasons — to handle cases of petty offenses. Consequently, non-Indians who commit such offenses against

[38] Donnelly v. United States, 228 U.S. 243 (1913); United States v. Pelican, 232 U.S. 442 (1914); Guith v. United States, 230 F.2d 481 (9th Cir. 1956).

[39] See 25 C.F.R. § 11.2 (a).

[40] United States v. Nice, 241 U.S. 591 (1916), overruling Matter of Heff, 197 U.S. 488 (1905).

[41] State v. Pepion, 125 Mont. 13, 230 P.2d 961 (1951); State *ex rel.* Irvine v. District Court, 125 Mont. 398, 239 P.2d 272 (1951).

[42] In State v. McAlhaney, 220 N.C. 387, 17 S.E. 2d 352 (1941), the Supreme Court of North Carolina upheld State jurisdiction to punish a white man for an assault upon an Indian within the Cherokee Indian Reservation in that State. The jurisdiction of North Carolina over the Cherokee Reservation is perhaps greater than that of Arizona over Indian country in the latter State. See COHEN, 56 n. 372; FEDERAL INDIAN LAW 186, n. 141.

In New York *ex rel.* Cutter v. Dibble, 21 How. 366 (1858), the summary removal of a white man from the Tonawanda Indian Reservation by a State court acting under a State law prohibiting persons other than Indians from settling or residing on Indian lands was upheld, the Court saying (21 How. at 370):

> . . . no law of Congress can be found which authorizes white men to intrude on the possessions of Indians.

[43] United States v. Lanza, 260 U.S. 377 (1922).

[44] Williams v. United States, 327 U.S. 711, 714 (1946), a case arising in Arizona.

[45] *Cf.* Pennsylvania v. Nelson, 350 U.S. 497 (1956).

Indians in Indian country — such as petty frauds and simple assaults, which are fairly numerous — usually escape prosecution entirely. The Indian tribes themselves, however, have authority to expel such persons from their reservations.[46] In effect this authority is difficult to exercise, for the petty offender is frequently a well-established trader or other tribal lessee; and expulsion in many such cases would be a punishment grossly disproportionate to the crime. A delegation of authority by the United States District Court to United States commissioners to try such petty offenses would seem indicated.[47] The fact that whites have apparent immunity for petty but insulting offenses against Indians on Indian reservations, while Indians are subject to prompt tribal court action in cases of similar offenses against whites, is a continuing cause of racial ill-feeling and a needless barrier to assimilation of the Indian citizens of Arizona.

C. Crimes having no victim — Federal jurisdiction.

1. *Indian offenders.* As a corollary of the principle that state courts have no jurisdiction over Indians in Indian country except where Congress has expressly conferred jurisdiction, Indians committing crimes which have no victim in Indian country are subject to federal and tribal jurisdiction only,[48] except in those instances discussed in Part V, B, of this paper (below) where Congress has given jurisdiction to the states. It is, however, misleading to speak of concurrent jurisdiction here, for most of the acts constituting federal offenses are not defined as offenses in the tribal code and vice versa.

Indians in Indian country, of course, are subject to federal prosecution for violation of general laws of the United States, as are whites in Indian country. The present 18 U.S.C. § 494 (1952), which prohibits forgery of any writing for the purpose of defrauding the United States is an example of such a law.[49]

In addition, Indians are subject to federal prosecution for violation of the Assimilative Crimes Act, 18 U.S.C. § 13, *within Indian country.* This act applies to offenses by Indians in such country which involve non-Indians as victims as well as to crimes which have no victim, but it does not apply to crimes by one Indian against the person or property of another Indian, because these crimes, save for the major ten of 18 U.S.C. § 1153, are excepted entirely from federal jurisdiction by 18 U.S.C. § 1152, quoted above. The Assimilative Crimes Act is discussed

[46] 18 Op. Atty. Gen. 34 (1884).

[47] 18 U.S.C. § 3401 (1952), amended by act of July 7, 1958, § 12(j), 72 STAT. 348, authorizes United States Commissioners "specially designated for that purpose by the court" to try and to sentence persons committing petty offenses within areas of exclusive or concurrent federal jurisdiction.

[48] See *In re* Blackbird, 109 Fed. 139 (W.D., Wis. 1901); United States *ex rel.* Lynn v. Hamilton, 233 Fed. 685 (W.D., N.Y. 1915).

[49] Head v. Hunter, 141 F.2d 449 (10th Cir. 1944).

below in subsection B 4 of Part IV of this article.

2. *Non-Indian Offenders.* The question of whether a non-Indian committing a violation of state law involving no victim is subject to prosecution in state court or in federal court under the Assimilative Crimes Act is one on which the decided cases cast no light. The former Attorney General of Arizona, however, seemed to take the position that the state has jurisdiction. See Opinion No. 58-71 (May 9, 1958.) Cases of this kind usually involve traffic violations by whites on state highways traversing Indian reservations, and in actual practice are always prosecuted in state courts. This seems to be proper; no substantial federal or Indian interest is involved. On the other hand, a white man guilty of vagrancy on an Indian reservation could probably be properly subjected to federal prosecution, for the property and morals of the Indian wards of the federal government are endangered by his offense. The author knows of one case where a white vagrant at Shiprock, New Mexico, on the Navajo Indian Reservation was successfully prosecuted by the tribal police before a state justice of the peace. There was no appeal.

D. Offenses by Indian against Indian — the "Ten Major Crimes".

By the act of February 18, 1875,[50] section 2145 of the Revised Statutes (1875), which is substantially carried forward in the present 18 U.S.C. § 1151, was made inapplicable to crimes committed by one Indian against the person or property of another Indian. This exception was actually first expressed in section 2 of the act of March 3, 1817,[51] and seems to have been omitted from the original Revised Statutes of 1875 by inadvertence. In the case of *Ex parte Crow Dog*,[52] it was held that the federal courts had no jurisdiction to punish an Indian for the murder of another Indian within Indian country, in view of this exception. As a result, Congress by section 9 of the act of March 3, 1885,[53] made it a federal offense for one Indian to murder another Indian or to commit manslaughter, rape, assault with intent to kill, arson, burglary, or larceny against the person or property of another Indian anywhere in a territory or within an Indian reservation in any state of the Union. The constitutionality of this act was upheld in the case of *United States v. Kagama*.[54] The authority of the United States to regulate the internal affairs of Indian tribes was upheld on the following remarkable ground (118 U.S. at 383-385):

> These Indian tribes *are* the wards of the nation. They are com-

[50] 18 STAT. 318.
[51] 3 STAT. 383.
[52] 109 U.S. 556 (1883).
[53] 23 STAT. 385.
[54] 118 U.S. 375 (1886).

> munities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

Indefensible as a statement of constitutional principle though the above quotation may be (see WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES, 386, 390 (2nd ed. 1929)), the authority of the United States to punish crimes by one Indian against another Indian within Indian country has never since been successfully challenged in a federal court.

By amendments adopted on March 4, 1909,[55] and June 28, 1932,[56] the list of crimes of Indian against Indian in Indian country which are within federal jurisdiction has been extended to the ten now listed in 18 U.S.C. § 1153. The present text of this section is as follows:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offense of rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offense of rape upon any female Indian within the Indian country, shall be imprisoned at the discretion of the court.

[55] Sec. 328, 35 STAT. 1088, 1151.
[56] 47 STAT. 336, 337.

> As used in this section, the offense of burglary shall be defined and punished in accordance with the laws of the State in which such offense was committed.

It should be noted that although larceny is among the ten crimes listed, the law and order regulations of the Department of the Interior provide punishment of not to exceed six months' labor for Indians convicted of theft in a Court of Indian Offenses.[57] Actually, only very aggravated cases of larceny are prosecuted in the federal court.

The federal jurisdiction over the Ten Major Crimes is exclusive as against the states, which have no concurrent jurisdiction in such cases.[58]

By the act of August 1, 1956,[59] Congress apparently intended to add an eleventh crime by an Indian against the property of other Indians to the list of such crimes within the jurisdiction of the federal courts. The text of this act follows:

> Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credit, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization; or
>
> Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another —
>
> Shall be fined not more than $5,000, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both.
>
> As used in this section, the term 'Indian tribal organization'

[57] 25 C.F.R. § 11.42.

[58] *In re* Carmen's Petition, 165 F. Supp. 942, 948 (N.D. Cal. 1958); *Ex parte* Pero, 99 F. 2d 28 (7th Cir. 1938); Yohyowan v. Luce, 291 Fed. 425 (E.D. Wash. 1923); *Ex parte* Van Moore, 221 Fed. 954 (S.D. 1915). The purpose of the Ten Major Crimes Act (18 U.S.C. § 1153) is to make an exception to the exclusion from federal jurisdiction contained in 18 U.S.C. § 1152 of crimes committed in Indian country by one Indian against another. It does not impliedly confer jurisdiction on the states over criminal acts not included in the ten enumerated. United States *ex rel.* Lynn v. Hamilton 233 Fed. 685 (W.D., N.Y. 1915); State v. Rufus, 205 Wis. 317, 237 N.W. 67 (1931); Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958). Jurisdiction over such other crimes by Indian against Indian is left with the tribes. United States v. Quiver, 241 U.S. 602 (1916); Iron Crow v. Oglala Sioux Tribe, 129 F. Supp. 15 (W.D., S.D. 1955), affirmed, *sub. nom.* Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota, 231 F.2d 89 (8th Cir. 1956).

[59] 70 STAT. 792, 18 U.S.C. § 1163 (Supp. V, 1958).

> means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

Oddly, the statute just quoted does not state expressly that it applies to Indian defendants, and thus the exception contained in 18 U.S.C. § 1152 concerning crimes committed within Indian country by one Indian against the property of another Indian would seem to bar federal prosecution of Indians who embezzle tribal funds while on the reservation; yet the legislative history[60] shows that embezzlement by Indian tribal officials was the principal evil this legislation was intended to remedy.

IV. STATE CRIMINAL JURISDICTION

A. Crimes in which Indians are not involved.

Arizona has exclusive jurisdiction to punish a non-Indian for a crime committed against a non-Indian in Indian country in this state. See above, Part III. It also has jurisdiction to punish a non-Indian for a crime committed in Indian country which has no victim. The latter jurisdiction is probably not exclusive. See subsection C 2 of Part III, above. The extent of state jurisdiction over Indian country is excellently summed up by the Supreme Court in *Williams v. Lee*, 79 Sup. Ct. 269 (January 12, 1959), as follows:

> Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the broad principles of that decision came to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained. Thus, suits by Indians against outsiders in state courts have been sanctioned. See *Felix v. Patrick*, 145 U.S. 317, 332; *United States v. Candelaria*, 271 U.S. 432. See also *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456. And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. E.g., *New York ex rel. Ray v. Martin*, 326 U.S. 496. But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. *Donnelly v. United States*, 228 U.S. 243, 269-272; *Williams v. United States*, 327 U.S. 711. Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. Cf. *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28.

[60] S. REP. No. 2723, 84th Cong., 2d Sess. (1956).

B. Crimes in which Indians are involved either as offenders or victims.

There are two theories on the extent of state jurisdiction over the persons of Indians in Indian country. The first, established by the Supreme Court of the United States in *Worcester v. Georgia*[61] in 1832, and consistently followed ever since by the federal courts, holds that the states have only such jurisdiction as Congress has conferred. The other is that the states have all jurisdiction which Congress has not taken away, either expressly or by pre-empting the field with its own legislation. Following the second theory the Supreme Court of Arizona in *Williams v. Lee*,[62] not finding any positive federal statute to the contrary, held that the Superior Court of Arizona in and for Apache County had jurisdiction over an Indian defendant in a civil case, despite the fact that service of the summons was made in the Navajo Reservation and the cause of action accrued within the reservation. A few weeks later, in *Application of Denetclaw*,[63] the Arizona Supreme Court held that a state justice of the peace did not have jurisdiction to try an Indian for a traffic violation committed within the Navajo Reservation, finding in this case a federal statutory pre-emption of jurisdiction under 18 U.S.C. § 1152. The Arizona court's theory, which has considerable support in other state decisions,[64] was finally laid to rest by *Williams v. Lee* on writ of certiorari.

Thus the law is now thoroughly settled that states have only such jurisdiction over Indians in Indian country as Congress has conferred. In the absense of Congressional legislation, a state has no jurisdiction.

To date, Congress has acted in only a limited extent to confer jurisdiction on the courts of the State of Arizona over the persons of Indians for crimes committed in Indian country:

1. *Sanitation and quarantine.* By the act of February 15, 1929,[65] the Secretary of the Interior is directed, under such rules and regulations as he may prescribe, to permit the agents and employees of any state to enter Indian country to enforce sanitation and quarantine regulations.

2. *School attendance.* By the act of August 9, 1946,[66] the preceding statute was amended to direct the Secretary, under rules prescribed by himself, to permit state agents to enter Indian country for the additional purpose of enforcing state compulsory school attendance laws against Indians, provided the Indians' tribal council first gives its consent. See

[61] 6 Pet. 515 (1832).
[62] 83 Ariz. 241, 319 P.2d 998 (1958).
[63] 83 Ariz. 299, 320 P.2d 697 (1958).
[64] State v. Doxtater, 47 Wis. 278, 2 N.W. 439 (1879), overruled by State v. Rufus, 205 Wis. 317, 237 N.W. 67 (1931); Stacey v. LaBelle, 99 Wis. 520, 75 N.W. 60, 67 Am. St. Rep. 879, 41 L.R.A. 419 (1898); Anderson v. Britton, 212 Ore. 1, 318 P.2d 291, 300 (1957), cert. denied, 356 U.S. 962 (1958).
[65] 45 STAT. 1185.
[66] 60 STAT. 962.

25 U.S.C. § 231 (1952).

It appears that the Secretary of the Interior has not yet promulgated any general regulations under the act of February 15, 1929, as amended. The author does not know how many Arizona Indian tribes have consented to State enforcement of compulsory school attendance laws; the Navajo Tribal Council by resolution adopted August 11, 1952, has consented wherever a public school district lies or extends within the Navajo Reservation. The Navajo courts construe this state jurisdiction as concurrent with their own; and in fact almost all enforcement of school attendance on the Navajo Reservation is done by tribal or federal administrative action.

3. *Section 6 of the General Allotment Act.* Section 6 of the General Allotment Act of February 8, 1887,[67] as amended by the act of May 8, 1906[68] (25 U.S.C. § 349 [1952]), provides another, rather shadowy extension of state jurisdiction to the Indian country. The General Allotment Act[69] contemplated that Indian reservations would be parcelled out in 40, 80, or 160 acre tracts to individual Indians, and the surplus land sold to whites. The Indian parcels, called allotments, were to be held in trust by the United States for the individual Indian allottee for 25 years, and then patented to him in fee. As originally enacted, section 6 provided that when all Indians of a particular band or tribe had received allotments, they should be subject to the laws, both civil and criminal, of the state or territory in which they resided. By the act of May 8, 1906,[70] the law was amended to defer the time at which any particular Indian allottee became subject to state law until actual issuance of the patent in fee.[71]

A discussion of the General Allotment Act is beyond the scope of this paper; it suffices to say that the plan contemplated was a fiasco, and the allotting of Indian reservations was stopped in 1934.[72] The existing periods of trust and restriction on alienation of allotments within Indian reservations where the tribe accepted the Indian Reorganization Act[73] were indefinitely extended by section 2 of this act.[74] Where the tribe

[67] 24 STAT. 390.
[68] 34 STAT. 182.
[69] 24 STAT. 388 (1877), as amended, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349 (1952).
[70] 34 STAT. 182.
[71] The act of May 8, 1906, c. 2348, 34 Stat. 182, extending to the expiration of the trust period the time when the allottees of the act of 1887 shall be subject to state laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty.—United States v. Celestine, 215 U.S. 278, 291 (1909). See also United States v. Pelican, 232 U.S. 442, 450-451 (1914).
[72] See Indian Reorganization (Wheeler-Howard) Act, § 1, 48 STAT. 984 (1934), 25 U.S.C. § 461 (1952).
[73] 48 STAT. 984 (1934), as amended, 25 U.S.C. §§ 461-478 (1952).
[74] 48 STAT. 984 (1934), 25 U.S.C. § 462 (1952).

rejected the Reorganization Act, all trust periods expiring on a given date are extended by one general executive order issued annually.[75] However, many allotments have been patented in fee, and authority still exists for issuing patents on trust allotments where the Indian applies for patent and proves himself competent to manage his own affairs.[76] In Arizona, however, there are relatively few fee patent allotments.

In any event, where an Arizona Indian has received a patent in fee to his entire allotment (not for merely a part of it), he is subject to state laws, except with respect to those matters which are reserved to federal jurisdiction by federal statute.[77] Since all criminal offenses by Indians within the exterior boundaries of Indian reservations, except crimes by Indian against Indian other than the ten major crimes, are reserved to federal jurisdiction by subsequent enactment (18 U.S.C. § 1152), the General Allotment Act cannot realistically be said to confer much criminal jurisdiction on the states over Indians in Indian country. As to crimes by Indian against Indian in Indian country other than the ten major crimes, it is hardly conceivable that the state would or successfully could assert jurisdiction even if both perpetrator and victim were fee-patent Indians. As the Acting Solicitor of the Department of the Interior stated in the opinion entitled *Patents in Fee:*[78]

> Such complexities and distinctions as these have rendered the grant of State jurisdiction over Indians contemplated by the General Allotment Act largely ineffective. The sponsors of that legislation assumed that the allotment of the Indians in severalty would be but the prelude to the termination of their tribal relations and the liquidation of Federal supervision over them. When that program failed to be carried out, and the Indians, despite the fact that they were now citizens, continued to maintain their tribal relations and the Government continued its guardianship over them, the subjection of the Indians to the jurisdiction of the States ceased to have much reality. State law enforcement officers could not, after all, go around with tract books in their pockets, and being unable to distinguish a patent-in-fee Indian from a ward Indian, they did not commonly, concern themselves with law violations by Indians, and the theoretical jurisdiction of the States thus fell into innocuous desuetude. Thus, when it has been desired to confer on particular States criminal or civil jurisdiction over Indians, it has been accomplished by general statutes conferring such jurisdiction, irrespective of the tenure by which Indians held their lands.

[75] See 25 C.F.R. c. I, app.
[76] *E.g.*, act of May 8, 1906 (Burke Act), 34 STAT. 182, 25 U.S.C. § 349 (1952); act of June 25, 1910, 36 STAT. 855, as amended, 25 U.S.C. § 372 (1952).
[77] Cf. United States v. Nice, 241 U.S. 591 (1916).
[78] 61 I.D. 298, 304 (1954).

Where a fee patent issues for an Indian allotment outside the boundaries of an Indian reservation, the allotment ceases to be Indian country within the meaning of 18 U.S.C. § 1151, and thus its Indian occupants probably become subject to state jurisdiction for the crimes they may commit thereon, quite independently of section 6 of the General Allotment Act.

4. *The Assimilative Crimes Act.* Section 13 of title 18 of the United States Code (1952), commonly called the "Assimilative Crimes Act" reads as follows:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

The places "reserved or acquired as provided in section 7" include:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . . [18 U.S.C. § 7(3) (1952)].

Indian reservations are within this category of lands.[79] Thus the Assimilative Crimes Act bestows on the states the legislative jurisdiction to define crimes within Indian country while leaving unaffected the federal executive and court jurisdiction to apprehend and punish perpetrators of the crimes thus defined by state legislation.

At first blush the Assimilative Crimes Act would seem to enable state legislation to override tribal legislation save in the narrow field of crimes committed by Indian against Indian.[80] Simply by attaching a criminal penalty the state would seem able to make any legislation it wished applicable to the Indian country. Lending support to this view is *United States v. Sosseur*,[81] which held that an Indian could not operate a slot machine on an Indian reservation in Wisconsin contrary to the gambling laws of that state. The Enabling Act provision, common to Arizona and most other Western states, however, stands as a bar to such a sweeping interpretation:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to . . . all lands

[79] Guith v. United States, 230 F.2d 481 (9th Cir. 1956).
[80] See 18 U.S.C. § 1152 (1952).
[81] 181 F.2d 873 (7th Cir. 1950).

> lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States . . . that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.[82]

Former Attorney General Morrison of Arizona, nevertheless, took the position that the Assimilative Crimes Act extends the State Groundwater Code[83] to the Gila River Indian Reservation so as to make the drilling of irrigation wells within areas of the reservation defined as "critical groundwater areas" by the State Land Department a federal crime. The Attorney General's opinion has never been published, and federal officials refused to test the theory by initiating prosecution. In an earlier opinion,[84] the Solicitor of the Department of the Interior, without considering the Assimilative Crimes Act, held that the Arizona ground water law was not enforceable against Indian lands, and could not be made applicable by federal administrative or tribal action, but only by act of Congress. The Solicitor also opined that Indian "lands" included appurtenant water rights.

Former Attorney General Morrison's interpretation of the Assimilative Crimes Act is quite untenable. In enacting 18 U.S.C. § 13 in 1948 as a part of the general revision of the Federal Criminal Code, the intent of Congress was merely to recodify existing criminal law and not to make sweeping changes in federal-state relations.[85] Further, it is a principle of federal statutory construction that general laws of Congress do not apply to Indians unless so expressed as to clearly manifest an

[82] Act of June 20, 1910, 36 STAT. 569-570.
[83] A.R.S. §§ 45-301—45-324.
[84] *Applicability to Indian Lands of Arizona Law Regulating Withdrawal of Ground Water*, 61 I.D. 209 (1953).
[85] See H.R. REP. No. 304, 80th Cong., 1st Sess. (1947). The Reviser's Notes to 18 U.S.C.A. incorporate this report verbatim.

intention to include them.[86] Doubtful expressions in acts of Congress relating to Indians are to be resolved in favor of the Indians.[87] The Assimilative Crimes Act assimilates only such state laws as are not contrary to federal policy.[88] State laws in conflict with valid federal administrative regulations are not assimilated under 18 U.S.C. § 13.[89] *A fortiori,* state laws in conflict with the Enabling Act are not assimilated.

The Assimilative Crimes Act has no application to conduct which is expressly made criminal by another Federal law.[90]

A helpful discussion of the Assimilative Crimes Act is found in 70 Harvard Law Review 685-698 (1957).

It was settled in *United States v. Sharpnack,*[91] that federal prosecution will lie under the Assimilative Crimes Act for violation of state statutes enacted subsequently to the enactment date of the Assimilative Crimes Act; but the opinion of the court, contrary to Justice Douglas' dissent,[92] does not fairly imply that such state legislation can override established federal policy.

5. *Liquor — 18 U.S.C. § 1161.* By the act of August 15, 1953[93] Congress extended the legislative jurisdiction of the states into Indian country to control liquir traffic, to the extent that the state regulation is consistent with an ordinance of the tribe having jurisdiction. This act added a new section to the Federal Criminal Code (18 U.S.C. § 1161), which reads as follows:

> § 1161. Application of Indian liquor laws.
>
> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

[86] Elk v. Wilkins, 112 U.S. 94, 100 (1884); Swatzell v. Industrial Commission, 78 Ariz. 149, 277 P.2d 244 (1954); COHEN 172, 173.

[87] Carpenter v. Shaw, 280 U.S. 363 (1930); Squire v. Capoeman, 351 U.S. 1 (1956).

[88] Air Terminal Services, Inc. v. Rentzel, 81 F.Supp. 611 (E.D. Va. 1949); and, "The policy of leaving Indians free from State jurisdiction and control is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786 (1945).

[89] Hunt v. United States, 278 U.S. 96 (1928), a case arising in Arizona.

[90] Williams v. United States, 327 U.S. 711 (1946), a case involving a crime by a white man against an Indian committed on the Colorado River Indian Reservation in Arizona.

[91] 355 U.S. 286 (1958).

[92] Id. at 297.

[93] C. 502, 67 STAT. 586.

Section 3 of the act of August 15, 1953, provided:

> SEC. 3. The consent of the United States is hereby given to repeal of the third and eleventh paragraphs of article 20 of the constitution of Arizona, and that part of section 1 of article 21 of the constitution of New Mexico relating to the sales of intoxicants to Indians, if the people of Arizona and New Mexico shall adopt constitutional amendments to accomplish such repeal.

The Arizona constitutional provisions referred to, which prohibited introduction of intoxicating liquor into Indian country, were part of the "Irrevocable Ordinance" required by section 20 of Arizona's Enabling Act.[94] They were repealed, effective July 1, 1957, by an amendment approved by the voters on November 2, 1954.[95]

The New Mexico constitutional prohibition was eliminated just one month after Congress gave permission — on September 15, 1953.[96]

There appear to be no published judicial decisions construing 18 U.S.C. § 1161; but the Acting Solicitor of the Department of the Interior interpreted it in Opinion M-36241 of September 22, 1954, entitled *Permissible Scope of an Indian Tribal Ordinance Authorizing Transactions in Intoxicating Beverages within Area of Indian Country Subject to Jurisdiction of Such Tribe.* The background of this opinion is that the Attorney General of California had held that an Indian tribe had either to accept state regulation of liquor within its reservation *in toto*, or retain federal prohibition. The Acting Solicitor disagreed, writing:

> There is, of course, absolutely nothing in the Act or in its legislative history to suggest that the Congress had any intent to influence the content of the liquor laws of any State. This is true, also, respecting the content of any tribal ordinance adopted pursuant to the Act. Indeed, the juxtaposition of the statutory references to the laws of the State and to the tribal ordinances and their inclusion in the same clause with the same absence of modifying or limiting words, indicate that the Congress intended that the scope of such a tribal ordinance is to be as much within the discretion of the tribe as the scope of the State liquor laws is to be within the discretion of the State. The scope of neither appears to be limited by the Act.
>
> If the terms and conditions prescribed by a tribe in its ordinance permitting the sale of liquor on its reservation were in conflict with the applicable State law, and if a person were to sell intoxicants on such a reservation in accordance with the tribal ordinance but in

[94] 36 STAT. 569 (1910).
[95] See notes following ARIZONA CONSTITUTION, Art. 20 , pars. third and eleventh, in A.R.S.
[96] See note following N.M. CONST., Art. 21, § 1 in N.M. STAT. ANN. (1953).

contravention of the State law, the contravention of the State law would subject him to the penalties of 18 U.S.C., sections 1154, 1156, 3113, 3488, or 3618, as the case may be. On the other hand, it is also possible for a tribe to adopt an ordinance under the act of August 15, 1953, and a number of tribes have done so, which does not conflict with State law but in effect imposes conditions in addition to those specified by the laws of the State. For example, ordinances have been adopted which contain, in one form or another, a preference for Indians to engage in the sale of liquor on reservations, or which require that in addition to the obtaining of a State license, a purveyor of liquor on a reservation shall pay an additional fee to the tribe and obtain from it a tribal license. In the latter type of case, a purveyor of intoxicants on such an Indian reservation who fully complied with applicable State law, might nevertheless be in violation of 18 U.S.C., sections 1154, 1156, 3113, 3488, or 3618, if he had not also complied with the terms of the tribal ordinance.

A significant aspect of the Solicitor's opinion is that it states violation of state law or of tribal ordinance relating to liquor traffic within Indian country is punishable under federal law. Apparently, then, 18 U.S.C. § 1161 did not extend state court jurisdiction to punish Indian violators of state liquor laws for violations committed in Indian country. The situations where an Indian tribe by proper ordinance has opened its reservation to liquor is similar to that under the Assimilative Crimes Act, discussed in the preceding subsection of this paper. State legislative jurisdiction is extended, but the enforcement machinery remains federal or tribal.

The San Carlos Indian Reservation and the Fort Apache Indian Reservation are the only Indian country in Arizona where the tribal councils have adopted ordinances repealing prohibition.

6. *Public Law 280 of the 83d Congress.* By the much-criticised Public Law 280 of the 83d Congress,[97] the civil and criminal laws of California, Minnesota, Nebraska, Oregon, and Wisconsin were extended, with certain exceptions, to Indian country within those states. Sections 6 and 7 read as follows:

> Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That

[97] Act of August 15, 1953, c. 505, 67 STAT. 588.

the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

The purpose of this legislation is stated in House Report 848, 83d Congress, 1st Sess. (1953) 6:

> Your committee has amended the printed bill by adopting substitute language which operates to —
>
> (1) confer as of date of enactment, civil and criminal jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, excepting specified areas within three of these States as hereinafter noted.
>
> . . .
>
> (2) give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws.
>
> Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of these States, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian lands within the borders of these States — in the absence of consent being given for future action to assume jurisdiction — is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure.
>
> (3) give consent to all other States to acquire jurisdiction over criminal offenses or civil causes of action at such time and in such manner as by affirmative legislative action such States may elect to acquire jurisdiction.
>
> This provision would operate with respect to Nevada, and other States similarly situated. In Nevada, authorities of some counties

> have indicated their willingness to accept jurisdiction, others opposed it, and still others stated they would accept such jurisdiction only with an accompanying Federal subsidy. The reported bill leaves open for such States the door to acquiring jurisdiction in the future.

It is thus clear that Congress intended section 6 of the act to apply to Arizona and to other states having disclaimers of jurisdiction in their constitutions; if such states wish to assume jurisdiction over Indian country, an amendment of the state constitutions is required.[98] Section 7 applies to states such as Nevada, which never had a disclaimer in its constitution; mere legislative action is sufficient for such states to extend their jurisdiction to the Indian country.

To date, the writer is informed that Washington, South Dakota, and Nevada have purported to accept the invitation of Congress to extend their jurisdiction to Indian country. Despite the fact that the first two states have disclaimers in their constitutions, all three have acted by legislation only.

The Washington statute (Laws of 1957, c. 240, p. 941) directs the governor to extend state civil and criminal jurisdiction over the people and lands of any Indian tribe in the state when the tribal council has requested such extension. In view of the fact that the disclaimer of jurisdiction in the Washington constitution (Art. 26, par. 2) has not been repealed, the validity of this statute is doubtful.

The South Dakota statute (Session Laws, 1957, c. 319, p. 427) authorizes the boards of commissioners of the various counties to extend jurisdiction after they have negotiated a contract with the federal government under which the latter would bind itself to reimburse the county for the costs of law enforcement in Indian country. Since there is no authority for the federal government to enter into such contracts, the South Dakota statute is dormant. It also provides for referendum of the

[98] The interpretation of the enabling acts and state constitutions in H.R. REP. No. 848, 83d Cong., 1st Sess. (1953), is at variance with that of the Arizona Supreme Court in Porter v. Hall, 34 Ariz. 308, 321, 271 Pac. 411, 415 (1928), reiterated in Harrison v. Laveen, 67 Ariz. 337, 341, 196 P.2d 456, 458 (1948), which was based on ambiguous dicta of Chief Justice White in Draper v. United States, 164 U.S. 240 (1896). The Arizona court said in Porter v. Hall:

> . . . the exception set forth in our Enabling Act applies to Indian lands considered as property, and not as a territorial area withdrawn from the sovereignty of the state of Arizona.

Arizona Indian country is clearly a part of the state. Langford v. Montieth, 102 U.S. 145 (1880), cf. Worcester v. Georgia, 6 Pet. 515, 584, 585 (1832), concurring opinion of Mr. Justice M'Lean; Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930), dictum. But it does not follow that the disclaimers of jurisdiction required by the various Enabling Acts apply to Indian land only considered as property.

Whichever interpretation of section 20 of the Arizona Enabling Act (36 STAT. 569) may be correct, however, H.R. REP. No. 848, *supra*, is conclusive that Congress intended section 6 rather than section 7 of Public Law 280 (quoted in text) to provide the method for Arizona to extend its civil and criminal jurisdiction over activities involving Indians occurring in the Indian country.

Cf. State v. Paul, 337 P.2d 33 (Wash., April 24, 1959), upholding chapter 240, Washington Laws of 1957 — decided since the original writing of this article —

various Indian tribes before state assumption of jurisdiction. The South Dakota statute is subject to the same objection as the Washington one: it contradicts unrepealed constitutional provisions.[99]

The Nevada law (Laws, 1954-1955, c. 198, p. 297) provides for assumption of civil and criminal jurisdiction over Indian country in the state 90 days after July 1, 1955, except in counties which the respective boards of commissioners petition the governor to except from the operation of the law. There is no provision for consent of the Indians in the Nevada law, but the author is informed by the Superintendent of the Nevada Indian Agency that the boards of county commissioners in all but one case have followed the wishes of the Indian groups involved. In the one exception, the Walker River Tribe wished to come under state jurisdiction, but the commissioners of Mineral County excluded their reservation because of certain difficulties between the commissioners and the sheriff.

The voters of North Dakota on June 26, 1956, rejected a proposed amendment of their state constitution which would have inserted in the section disclaiming jurisdiction over Indian lands[100] the following words:

> . . . provided, however, that the legislative assembly of the State of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the State by Act of Congress.—Laws of North Dakota 1957, p. 783.

The legislature by Senate Concurrent Resolution "Q", adopted March 8, 1957,[101] resubmitted exactly the same proposal to the voters, who approved it in the June 1958 election by a vote of 74,398 to 40,639.[102]

As of February 6, 1959, the North Dakota Legislature had taken no action to avail itself of its newly created authority to extend state jurisdiction into the Indian country.[103]

In addition to conferring jurisdiction on the states named in Public Law 280, Congress has expressly conferred jurisdiction on states over Indians in certain areas of Indian country specified in the following legislation:

Act	*Citation*	*State*	Confers concurrent criminal jurisdiction over all Indian country in the state.
June 8, 1940	54 STAT. 249 18 U.S.C. § 3243	Kansas	

which, without considering the legislative history of Public Law 280, holds that the Washington legislature can amend the "irrevocable ordinance" contained in Article XXVI of the state constitution in disregard of the usual procedure for constitutional amendment.

[99] S.D. CONST., art. 22, par. 2; art. 26, par. 18.

[100] N.D. CONST. § 203, par. 2 — practically identical to ARIZ. CONST., art. 20, par. 4.

[101] Laws of North Dakota, 1957, p. 792.

[102] Letter from Ben Meier, Secretary of State of North Dakota, to the author, February 6, 1959.

[103] *Ibid.*

May	31, 1946	60 STAT. 229	North Dakota	Confers concurrent criminal jurisdiction over Devil's Lake Reservation only.
June	30, 1948	62 STAT. 1161	Iowa	Confers concurrent criminal jurisdiction over Sac and Fox Reservation.
July	2, 1948	62 STAT. 1224 25 U.S.C. § 232	New York	Confers exclusive criminal jurisdiction over all Indian country in the state.
October	5, 1949	63 STAT. 705	California	Confers exclusive civil and criminal jurisdiction over Agua Caliente Reservation.

The above list is not exhaustive, and some other states also exercise jurisdiction over Indians in Indian country, by virtue of older legislation or judicial decisions.[104]

It is unlikely that many more states will extend their criminal jurisdiction over Indian country under Public Law 280 in its present form, because this law does not authorize any corresponding extension of the taxing power of the state to recoup the added cost of law enforcement.

V. TRIBAL CRIMINAL JURISDICTION

The judicial jurisdiction of the Indian tribes over criminal offenses committed within Indian country is plenary, save to the extent that it has been limited by federal statute. While there are dicta to the contrary, it appears that the federal jurisdiction, and such state jurisdiction as exists, over Indians as defendants for criminal acts committed in Indian country in Arizona is concurrent with tribal jurisdiction. See above, Parts III D and IV B. Of course, where the conflict is clear-cut, Indian tribal legislation cannot override federal law.[105] In practice, Arizona Indian tribes never attempt to assert jurisdiction over their members for the more serious offenses which are made subject to federal jurisdiction by

[104] See, for example, REVISED STATUTES OF MAINE, c. 25, §§ 321-377 (1954) (Penobscot and Passamoquoddy Indian tribes).

> In some of the old States — Massachusetts, Connecticut, Rhode Island and others — where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government — the laws of the State have been extended over them, for the protection of their persons and property.—M'Lean, J., concurring in Worcester v. Georgia, 6 Pet. 515, 580 (1832).

[105] United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950).

18 U.S.C. § 1153.

25 C.F.R. §§ 11.38-11.87NH is a criminal code defining acts which constitute offenses against the tribe having territorial jurisdiction when committed by an Indian within Indian country.[106] This code is a regulation of the Department of the Interior and is in force on only two Indian reservations in Arizona, the Navajo and the Hopi. All other Arizona tribes have adopted their own codes, which, however, are modelled after 25 C.F.R. part 11 and follow it quite closely. The Branch of Law and Order of the Phoenix Area Office of the Bureau of Indian Affairs maintains a file of these tribal criminal codes. Both the Navajos and the Hopis have adopted additional criminal laws which do not appear in the Code of Federal Regulations.

The authority of the Secretary of the Interior to promulgate a criminal code is doubtful.[107] However, if a tribe by the action of its courts administers this code, the code should be upheld as the judicially-adopted common law of the tribe. This is the present situation on the Navajo Reservation.

The due process clauses of the Fifth and Fourteenth Amendments do not apply to the actions of Indian tribes.[108] Legal limitations on the legislative and judicial powers of Indian tribes with few exceptions must

[106] COHEN, 175, contains a somewhat over-rosy description of the law and order regulations of the Bureau of Indian Affairs which now appear as 25 C.F.R. part 11, quoting former Commissioner John Collier.

[107] *Cf.* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); and see Cohen, *The Erosion of Indian Rights, 1950-1953: a Case Study in Bureaucracy*, 62 YALE L. J. 348, 352 (1953):

> According to the statutes, American Indians are entitled to exercise all the rights of citizenship. [43 STAT. 253 (1924), 8 U.S.C. § 601 (1946). See Annotation, 8 U.S.C.A. § 601 (1946)]. But these rights are limited, in practice, by more than 2200 regulations now in force issued by the Commissioner of Indian Affairs. Many regulations, perhaps most, cite as their chief or sole authority Section 1 of the Act of July 9, 1832 [REV. STAT. § 463 (1875), 25 U.S.C. § 2 (1946)], which establishes the office of Commissioner of Indian Affairs and vests in that office 'the management of all Indian Affairs.' Similar housekeeping statutes vest responsibility for 'matters respecting foreign affairs' in the State Department, [REV. STAT. § 202 (1875), 5 U.S.C. § 156 (1946)] and the duty to 'develop . . . the transportation facilities of the United States' in the Department of Commerce. [32 STAT. 826 (1903), 5 U.S.C. § 596 (1946)]. These statutes have not been construed to give the Secretary of Commerce any power to improve the services rendered by our railroads or to give the Secretary of State any power over foreign nations. But Indians for some decades have had neither armies nor lawyers to oppose increasingly broad interpretations of the power of the Commissioner of Indian Affairs, and so little by little 'the management of all Indian Affairs [of the federal government]' has come to be read as 'the management of all the affairs of Indians.'

See also Solicitor's Opinion *Use of Allotted Lands*, 58 I.D. 103, 106 (1942).

The only authority cited in 25 C.F.R. part 11 is REV. STAT. § 463 (1875), 25 U.S.C. § (1952). These regulations are said to interpret or apply the act of August 1, 1914 § 1, 38 STAT. 586, 2 5 U.S.C. § 200 (1952), which merely requires a report to be submitted to the reservation superintendent whenever an Indian is incarcerated on an Indian reservation or at an Indian school.

[108] Talton v. Mayes, 163 U.S. 376 (1896); and see COHEN 123-124, 180-181.

be found in federal statutes or the tribes' own constitutions.[109] The Secretary of the Interior also exercises a veto power over Indian tribal legislation. Where a tribe has been organized under the Indian Reorganization Act,[110] this power is expressly given in the tribal constitution — which has led to the result that an act of Congress purportedly for the purpose of strengthening Indian self-government has in reality legalized bureaucratic control. Where the tribe has rejected the Indian Reorganization Act and justice is administered by Courts of Indian Offenses, the Secretary has conferred the veto power upon himself.[111]

All Arizona Indian tribes except the Hopi Tribe maintain tribal courts for the enforcement of applicable criminal and civil laws. With the exception of the Navajo courts these were set up pursuant to tribal constitutions adopted under the Indian Reorganization Act.

Prior to the establishment of the present tribal courts, criminal law was enforced on Arizona Indian reservations by means of Courts of Indian Offenses — tribunals consisting of Indian judges selected from the tribe or tribes over which they had jurisdiction by the Commissioner of Indian Affairs and paid from federal funds. The only authority the Commissioner had to establish such courts is found in the appropriation acts which mention salaries of Indian judges among the authorized items of expenditure.[112] Where this situation still exists (apparently, in Arizona only in Hopi country), the self-conferred Secretarial veto on tribal criminal legislation would appear valid, for the Courts of Indian Offenses as the Secretary's own administrative agencies could not properly enforce tribal law without an order to do so from the Secretary.

The legality of Courts of Indians Offenses was upheld in *United States v. Clapox*[113] on the ground that they were mere educational and disciplinary instrumentalities. COHEN states (p.149):

> Perhaps a more satisfactory defense of their legality is the doctrine put forward by a recent writer that the Courts of Indian Offenses 'derive their authority from the Tribe, rather than from Washington.'

This reasoning was followed by the Supreme Court of Arizona in *Begay v. Miller*,[114] and the Court of Appeals of the Eighth Circuit in *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*.[115]

The existing courts on the Navajo Reservation have the hybrid

[109] *Cf.* Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (N.M. 1954).
[110] 48 STAT. 984 (1934), as amended, 25 U.S.C. §§ 461-478 (1952).
[111] 25 C.F.R. § 11.1(e).
[112] COHEN 88.
[113] 35 Fed. 575 (D.C. Ore. 1888).
[114] 70 Ariz. 380, 222 P.2d 624 (1950).
[115] 231 F.2d 89 (8th Cir. 1956).

name of "Navajo Tribal Courts of Indian Offenses". Originally they were ordinary Courts of Indian Offenses, established by the Secretary of the Interior and staffed by judges who were federal employees. On September 15, 1950, the Navajo Tribal Council adopted a new ordinance, which, among other things, provided for popular election of five judges of the "Navajo Tribal Court of Indian Offenses". This ordinance was approved by the Secretary of the Interior, and the judges were duly elected and installed in office in 1951. The tribe paid their salaries from tribal funds. Thus, the courts on the Navajo Reservation were converted into instrumentalities of the Navajo Tribe, but retained the old name of "Courts of Indian Offenses". Under the Revised Election Procedures, adopted by the Navajo Tribe and approved by the Secretary of the Interior on November 12, 1954, under which supervision of Navajo Tribal elections by the Bureau of Indian Affairs was abolished, seven judges were elected in the 1955 tribal election for four-year terms. These judges are paid exclusively from tribal funds and there is no provision for approval of their installation or supervision of their work by the Bureau of Indian Affairs.

On October 16, 1958, the Navajo Tribal Council adopted an ordinance[116] establishing a new judicial system consisting of a trial court of seven judges and a court of appeals made up of a full-time chief justice and two judges who are to be called up from the trial court to sit in particular cases. These judges and the chief justice are to be appointed by the Chairman of the Navajo Tribal Council, with the approval of the Council, for two-year probationary terms, during which they must pursue a course of study specified by the Chairman. At the end of the probationary period the Chairman may nominate any probationary judge to be a permanent judge, and with the advice and consent of the Council, appoint such person to hold office during good behavior. The new Navajo system of selecting judges appears to be an improvement over that followed by many states of the Union.

Resolution No. CO-69-58 was amended by Resolution No. CJA-5-59 of the Navajo Tribal Council on January 9, 1959. The new judicial system came into operation on April 1, 1959.

There is an important limitation on the criminal jurisdiction of Arizona Indian tribes: the jurisdiction extends only to cases in which an Indian is the defendant. By virtue of this regulation where it is applicable, and tribal criminal codes where they are applicable (it is believed they all contain a similar limitation on the jurisdiction of tribal courts), state jurisdiction is exclusive over crimes committed within Indian country in Arizona by non-Indians against other non-Indians, and federal jurisdiction is exclusive over crimes committed by non-Indians

[116] Resolution No. CO-69-58.

against Indians. It is doubtful, however, whether any constitutional principle or federal statutory law ousts the courts of Indian tribes of jurisdiction over non-Indians as defendants. On this subject, COHEN states (p. 148):

> On the other hand, attempts of tribes to exercise jurisdiction over non-Indians, although permitted in certain early treaties, have been generally condemned by the Federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody.

The only authority cited for this statement is *Ex parte Kenyon*,[117] In this case, Kenyon, the widower of a Cherokee woman, was convicted and imprisoned by a Cherokee court for stealing a horse. The horse belonged to Kenyon's dead wife, whose estate had not been probated. The petitioner took the horse to Kansas and pledged it for a time to secure a debt, then he reclaimed it, and, it is said, converted it to his own use. All of this was done in the State of Kansas. How the Cherokee authorities took Kenyon into custody is not stated. Upon petition for a writ of habeas corpus, the court held:

1. That a federal court has the authority to issue a writ of habeas corpus to run in the Cherokee Nation and Indian territory.
2. The acts for which Kenyon was convicted by the Cherokee court were committed outside the territorial jurisdiction of the Cherokee Nation.
3. The Cherokee courts have jurisdiction only over Indian defendants. If Kenyon was an Indian by adoption, he ceased to be one upon removing to Kansas.

In *Elk v. Wilkins*,[118] ground 3, above, was disapproved by the Supreme Court of the United States, which stated that the second ground alone was sufficient to settle the case and show Kenyon entitled to be released from custody. Therefore, it is doubtful that the quoted statement from COHEN is correct.

It is unlikely that any Indian tribe would wish to assume jurisdiction over non-Indian defendants in serious criminal cases. However, they could and should have jurisdiction over non-Indian defendants for petty offenses; for example, there is no judicial machinery existing at the present time to enforce the parking regulations in Indian villages against non-Indians, or to enforce the regulations of Indian villages against taking pictures by non-Indians. These perfectly legitimate objectives of

[117] 14 Fed. Cas. No. 7720 (C.C., W.D. Ark. 1878).
[118] 112 U.S. 94, 108 (1884).

local self-government should be enforceable by the Indian authorities not only against their own members but against those persons who accept their hospitality and then abuse it.

Professional lawyers are not admitted to practice before Courts of Indian Offenses or tribal courts.[119] The feeling of the governing bodies of the tribes is that to permit professional attorneys to appear in their courts would give an undue advantage to wealthy litigants. This rule applies in civil as well as criminal cases. Despite some earlier abuses, non-Indian plaintiffs who have brought civil actions against Navajo Indians in the Navajo Tribal Courts of Indian Offenses, with which the writer is familiar, in recent times have found the exclusion of professional attorneys to be quite satisfactory.

Professional attorneys are permitted to draw up complaints and other papers for filing in Indian courts.

The pleadings and other documents used in Indian courts are in English, which in many cases the litigants and judges are not able to write fluently. Consequently, the pleadings are usually not models of form. This scandalizes certain lawyers unfamiliar with actual conditions on the Indian reservations; but the Indians themselves understand their pleadings and prefer to sacrifice literary elegance to a system of fair play which allows every litigant to have his say in his own words, without the necessity of paying lawyers' fees which he cannot afford. The oral proceedings in Indian courts are conducted in the native language.

In general, the tribal courts and Courts of Indian Offenses satisfy the needs of the Indians. Miscarriages of justice are no more frequent in tribal courts than in state courts, perhaps less frequent, because more attention is paid to the realities of the controversy than to the skill of the advocates.

The Code of Federal Regulations, where applicable, and the tribal codes, provide for trial at the request of the defendant by a six-man jury, which may render a verdict by a majority vote.[120] Juries are a creation of the common law and foreign to the Indian tradition; therefore they are seldom requested.

CONCLUSION AND OUTLOOK

The rules defining federal, state and tribal jurisdiction over crimes committed in Indian country by or against Indians are one of the best settled fields in American law. In enacting the sections of the Criminal Code of 1948 concerning Indians,[121] Congress approved and confirmed

[119] Cf. 25 C.F.R. § 11.9.
[120] 25 C.F.R. § 11.7.
[121] 18 U.S.C. §§ 1151-1156, 1158-1160, 3242 (1952); 18 U.S.C.A. §§ 1161-1163 (Supp. 1958).

a great body of case law.[122] *Williams v. Lee*[123] has made no change whatever in the jurisdictional status of Indians and Indian country. The jurisdiction the State of Arizona has over Indians in Indian country has always been very limited.

The reasons for the present jurisdictional status of Indian country are historic,[124] but what are the reasons for continuing this status? In 1886, the Supreme Court of the United States justified the then current federal control and corresponding exclusion from state jurisdiction in these words:

> These Indian tribes *are* the wards of the nation . . . They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.[125]

The Indian Citizenship Act of 1924[126] nullified the statement that Indians owne no allegiance to the states, but the rest of the quotation is not wholly without validity even today. As stated by J. Maurice McCabe, an Indian, the Secretary-Treasurer of the Navajo Tribe, before the Indian Affairs Subcommittee of the House Interior and Insular Affairs Committee meeting in Tucson on August 30, 1955:[127]

> The situation has improved since those words were written. Our white neighbors in Arizona and New Mexico are not our enemies, but even to this day there is nothing like adequate mutual understanding between them and us. I am grieved to have to say this, but in Utah, the situation is worse than it was in 1886. There is actual warfare against us by the white stockmen and the county officials of San Juan County. Within the past four years there have been acts of violence and flagrant denial of civil rights; and I believe in each of these cases, the Utah officials rather than the Navajos have been the aggressors. State deputy sheriffs have decided that the Navajos living off the reservation in San Juan County are 'trespassers' because certain headmen of the Navajo Tribe signed a treaty

[122] See Reviser's Notes following 18 U.S.C.A. §§ 1151-1160 (1952), §§ 1161-1163 (Supp. 1958).
[123] 79 Sup. Ct. 269 (1959).
[124] See Part I of this article, *supra.*
[125] United States v. Kagama, 118 U.S. 375, 383 (1886).
[126] 43 STAT. 253, superseded by Immigration and Nationality Act, § 301 (a) (2), 66 STAT. 235 (1952); 8 U.S. C. § 1401 (a) (2) (1952).
[127] *Hearings Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs,* 84th Cong., 1st Sess., ser. 17, at 41-43 (1955).

at Fort Sumner in southeastern New Mexico, in 1868 to cede this land to the United States.[128] The ancestors of the particular Navajos who live in San Juan County off the reservation never went to Fort Sumner, and have occupied their ancestral lands continually down to 1951, when the District Court of San Juan County issued an injunction ordering them out of their immemorial homes.[129] In one case, that of Bunziba, Jim Joe's daughter, the Navajo had an allotment on the public domain and nevertheless the Utah deputy sheriffs drove her off this legally recognized landholding merely because of her race and tribe. Navajo women have been shot by Utah officials, simply to terrorize them and drive them off their ancestral lands. Most of the Navajo-owned horses in San Juan County were stolen and destroyed by employees of the Bureau of Land Management working in concert with the commissioners of San Juan County and for the benefit of less than a dozen rich and greedy white stockmen. The situation in San Juan is a black chapter in Indian-white relations such as most Americans do not dream could exist in the 20th century.

I am here not to discuss the San Juan County outrages, a part of which is pending judicial review before the Supreme Court of the United States,[130] but rather to discuss the necessity for amendment of Public Law 280 of the 83rd Congress. By the law as it stands now, any State by an act of its legislature or amendment of the State constitution, if necessary, can extend its civil and criminal jurisdiction over our reservation. Our wishes in the matter are immaterial under Public Law 280. By amendment to the constitution of Utah, the State could send those same deputy sheriffs who are now killing our horses and shooting our women in San Juan County into any part of the million acres of our reservation in Utah, to enforce 'law and order'. In this case, Public Law 280 puts us naked before our enemies.

In the letter from the Department of the Interior commenting on S. 51, a similar bill to H.R. 6070, it is stated that the possibility of discrimination against Indians in State Courts is purely speculative. The only explanation for such a statement in view of the San Juan County situation is that employees of the Bureau of Land Management in Utah have deliberately misinformed their superiors in Washington.

[128] See Treaty With the Navajo Tribe of Indians, June 1, 1868, 15 STAT. 667 (effective August 12, 1868).

[129] *Aff'd.*, Young v. Felornia, 121 Utah 646, 244 P.2d 862 (1952), *cert. denied*, 344 U.S. 886 (1952). See also United States v. Hosteen Tse-Kezi, 93 F. Supp. 745 (1950); *rev'd*, 191 F.2d 518 (1951).

[130] See Hatahley v. United States, 351 U.S. 173 (1956), *reversing* 220 F.2d 666 (10th Cir. 1955); *further proceedings*, 257 F.2d 920 (1958).

As I have said, the people of Arizona and of New Mexico are not our enemies, yet they do not understand us sufficiently to be able to administer justice in our country. I know that those of us who live in Arizona are now citizens of Arizona and have the technical right to vote in Arizona elections. Actually, Arizona imposes a literacy test on prospective voters which 85% of our people cannot pass. For example, in the Chinle school district on our reservation, all three members of the board are white traders. The Navajo Indians have no voice. What is even worse, Arizona law provides that to be eligible to vote in an election on the location of a school, the voters must be real property taxpayers.[131] Not one Navajo Indian in all of the Chinle school district can qualify. Most of the traders even cannot qualify. There is a dispute in that district now about whether the new schoolhouse should be built at Chinle or at Many Farms and by the law of Arizona 99.99% of the parents of the children involved are denied any say whatever in the matter.

I have given an example where the laws of Arizona are cruelly inapplicable to conditions on our reservation. I could give you more. For example, the laws relating to juvenile delinquency, and the law relating to marriage, which would outlaw our traditional wedding ceremonies because they are not conducted by a judge or a clergyman.[132]

It may be stated that the Arizona literacy test for voters is justified because illiterate persons do not have sufficient understanding to participate in State government. If this is true, the Navajo people are clearly not ready for State jurisdiction, because we are 85% illiterate.

The goal of American Indian policy as I understand it is to raise us to a position of equality with our white neighbors. This

[131] A.R.S. § 15-1302 D (later amended by Ariz. Sess. Laws 1957, c. 82 § 1, A.R.S. § 15-1302.01 A [Supp. 1958]).

[132] See A.R.S. § 25-124. *Compare* Resolution No. CJ-2-40, Navajo Tribal Council Resolutions, vols. I & II, 79 (1951):

. . . in tribal custom marriages the following rites shall be observed:

1. The parties to the proposed marriage shall have met and agreed to marry.
2. The parents agree, the date is set, and the marriage ceremony is performed as follows:
   1. The ceremony is held in the hogan of the bride's parents.
   2. The bridegroom pours water into the outstretched hands of the bride; she does likewise for him.
   3. The bride and bridegroom then eat cornmeal mush out of the sacred basket.
   4. Those assembled in the hogan then give advice for a happy marriage to the bride and groom.
   5. Gifts may or may not be exchanged.

Resolution No. CJ-2-40 was superseded by Resolution No. CO-54-56, Navajo Tribal Council Resolutions 1956, 59 (effective January 1, 1957). The latter resolution, in effect provides for inception of marriages between Navajo Indians by written contract, with ceremony permitted at the option of the parties, but not required.

> means that we must be sufficiently schooled in the art of self-government to do our duty as citizens, and we must have sufficient education and economic opportunities to compete for a living on an equal basis. We are getting our practice in self-government in our own tribal organization. We have a democratically elected Chairman, Vice-Chairman, and council of 74 members. Our last election was held in March of this year and 16,911 people voted. We, the Navajos, without any intervention by federal officials, conducted and paid for the entire election ourselves; and I might say that there were no vote frauds anywhere. We did not impose a literacy requirement in our tribal elections. If we did, the majority of our people would have no opportunity for self-government for the next 40 years. If the State of Arizona were to assume jurisdiction, that is just what would happen.
>
> With us Navajos the problem is not so much learning self-government; but retaining our right to it.

Counsel for the appellee in *Williams v. Lee* asked the inevitable rhetorical question in this brief before the Supreme Court of Arizona:[133]

> What manner of citizens do appellants claim to be that they have all of the rights and advantages, all of the privileges, benefits and protections of citizens, yet none of the obligations nor responsibilities? Is it to be said that they may elect the governing officers of that county, namely the supervisors, influence the management and control of the affairs of the county and yet disclaim responsibility for the results?

The question, however, is grossly misleading. The Indian citizens of Arizona enjoy the same rights as the other citizens only in a fictitious and legalistic sense. Only 20 per cent of the Navajo Indians are now literate and thus eligible to vote in Arizona.[134] Only 40 per cent of the next most numerous tribe, the Papagos, are literate. Bad roads and long distances from the polling places actually disfranchise many Indians who can comply with the literacy law.

The average income of a Navajo Indian is about $450.00 a year — only about a quarter of the national average.[135]

The Indians of Arizona, thus, are still very greatly handicapped in their exercise of civil rights and in their economic opportunities. This fact alone justifies their continued federal guardianship and their

[133] Brief for Appellee, p. 16, Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1958).
[134] See A.R.S. § 16-101; Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948).
[135] YOUNG, THE NAVAJO YEARBOOK OF PLANNING IN ACTION, REPORT NO. V, 64 (1955).

special legal position, while in Indian country, which this guardianship entails.

The policy of the United States of terminating the special services, and resultant special status, of American Indians as soon as possible is set out in House Concurrent Resolution 108 of the 83rd Congress.[136] This Concurrent Resolution probably did not represent a shift in federal policy; such has been the consistent federal policy since 1887, insofar at least as the federal government has had any consistent policy in its dealings with Indians. When, through education and economic development, the very real handicaps under which the Indian citizens of Arizona now labor have been overcome, there will be no further reason for continuing the federal guardianship; and the special exemptions from the coercive force of state law which this guardianship involves can safely be abolished. Of course the determination of when that time has come is a political one to be made by the legislative branch rather than by the courts.[137]

That time is still far in the future. The proportion of Navajo children of school age for whom schools were available exceeded 50 per cent for the first time as recently as 1950. The first year when substantially all Navajo children attended school was 1955,[138] despite a provision in the Treaty of June 1, 1868,[139] guaranteeing a school room and teacher to every thirty Navajo children between the ages of 6 and 16 who could be "induced or compelled" to attend. It will probably be forty years before all members of the Navajo Tribe know how to speak, read and write English. While the educational and developmental process is going on, the Indians are in a transitional status. During this period of transition they enjoy, legalistically speaking only, most of the rights, privileges, and benefits of the other citizens of Arizona; but are exempt as long as they stay in Indian country from most of the coercive force of state law.

This situation is not really unfair to anyone. It is necessary to protect the Indians while they are striving to overcome a cultural lag of 5,000 years behind the people of European extraction. The Indians are striving in 40 years to learn what it took our ancestors since the time of Pharaoh Menes to do. During the present transition period the Indians enjoy some rights without the corresponding responsibilities, but so does the State of Arizona. More than half of the present assessed value of Apache County, for example, consists of the property of non-Indians within the Navajo Indian Reservation. This property is fully

[136] 67 STAT. B 132 (1953).
[137] United States v. Rickert, 188 U.S. 432, 445 (1903).
[138] YOUNG, *op. cit, supra,* note 135, Table, "Growth of Navajo Education", p. 172.
[139] Art. VI, 15 STAT. 669.

taxable, and is currently being taxed,[140] although the federal government continues to reimburse the state for the cost of educating Indian children in public schools. In addition, the federal government, at its sole expense, educates some 14,000 Arizona Indian children in federal schools. The Navajo Indians themselves pay almost all costs of law enforcement on their reservation, even paying much of the cost of enforcing state law upon non-Indians by means of Navajo policemen commissioned as deputy sheriffs and deputy members of the Arizona Highway Patrol, without cost to the counties or state.

Following the Supreme Court decision in *Williams v. Lee*, a resolution[141] was introduced in the Arizona State Senate to submit to the voters a proposed self-executing amendment to Article 20, par. 4 of the Arizona Constitution, which would extend the civil and criminal jurisdiction of the state to all Indians and Indian lands within the state. The resolution died in committee.

Arizona is well advised not to extend its jurisdiction within Indian country. By the 1950 census, Arizona had more Indian inhabitants than any other state (66,900), constituting 8.9% of the total population. The great majority of these Indians lived on the Indian reservations, which embrace 30,453 square miles, or about 27% of the total area of the state. The comparable population figures and percentages of the total population made up of Indians in states which have taken steps to assume jurisdiction or already have jurisdiction over Indian country are as follows:[142]

California	24,600 (0.2%)	New York	15,200 (0.1%)
Iowa	1,700 (0.1%)	North Dakota	11,700 (1.9%)
Kansas	3,600 (0.2%)	Oregon	6,800 (0.4%)
Maine	1,700 (0.2%)	South Dakota	25,600 (3.9%)
Minnesota	14,000 (0.5%)	Washington	16,200 (0.7%)
Nebraska	5,700 (0.4%)	Wisconsin	13,900 (0.4%)
Nevada	6,100 (3.8%)		

A mere glance at the table shows the great dissimilarity of the situation in Arizona to that in these other states.

An indication of the cost to Arizona of extending its criminal jurisdiction to Indian country can be gained from the appropriations for law enforcement on only one of the fourteen major Indian reservations in the state. The Navajo Tribal Council appropriated $460,000 out of tribal funds during Fiscal Year 1958 for operating costs of law enforcement on the Arizona portion of the Navajo Reservation. An additional

[140] Under the rule of Thomas v. Gay, 169 U.S. 264 (1898), and Oklahoma Tax Commission v. Texas Co., 336 U.S. 342 (1949).

[141] S.C.R. 9, 24th Legislature, 1st Reg. Sess. (introduced January 27, 1959).

[142] BUREAU OF INDIAN AFFAIRS, INDIAN POPULATION OF CONTINENTAL UNITED STATES 1950 (1955).

$347,000 was appropriated for construction of courthouses, police stations, and jails in this part of the reservation.

While undesirable from the state taxpayers' point of view, extension of the criminal and civil jurisdiction of Arizona to Indian country would be disastrous to the Indian people. Arizona's Indians are among the most primitive in the United States. Well over half of the adults have had no formal education. They are not only illiterate, but unable to speak English. Their traditions are as foreign to the main stream of European and American culture as those of Tibet. There are at the present time, so far as the author knows, no lawyers of the Indian race in Arizona. There are no Indians holding elective state or county offices.

Under these circumstances for the state to subject Indians for crimes committed in Indian country to criminal prosecutions in state courts before judges in whose election they are barred from participating by the literacy law,[143] and by juries on which they are barred from serving because of lack of knowledge of English,[144] would undermine their civil rights, and if done in the guise of extending to them the equal protection of the laws would be rank hypocrisy.

Moreover, there is at the present time no need for extension of state criminal or civil jurisdiction to the Indian country in Arizona. The Indians are doing a good job of maintaining their own law and order.

[143] A.R.S. § 16-101 A. 4.
[144] See A.R.S. § 21-201.

COMMENTS

State Segregation Laws and Judicial Courage

LYNN M. LANEY*

So much criticism which I deem unsound has been written about the United States Supreme Court's recent decisions holding that segregation of colored children in public schools violates our Constitution, that it would seem to be timely for some lawyer of the white race to make a realistic report on the historic facts leading up to those decisions. As Al Smith used to say, "Let's look at the record":

The case of *Dred Scott vs. Sandford*[1] was decided by the United States Supreme Court on March 6, 1857. That decision, historians tell us, had much to do with bringing on the Civil War. In substance, it held that the Constitution of the United States did not protect a person of the Negro race, even in a state whose laws made him a free man, and that a Negro and his children were not citizens and did not have the constitutional rights of citizens.

Then our nation fought the Civil War with the result that slavery in the United States was abolished.

Thereupon, to the end of implementing the Emancipation Proclamation and also undoing the legal effect of the *Dred Scott* decision, the Fourteenth Amendment to the Constitution of the United States was adopted. Section 1 of that Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person wthin its jurisdiction the equal protection of the laws.

Then on May 18, 1896, in the case of *Plessy vs. Ferguson*[2] the Supreme Court of the United States first sanctioned the so-called "separate but equal" doctrine relative to segregation of the races. That case involved transportation, but did not involve schools, and the Court held that a law of the State of Louisiana, compelling the segregation of

* See Contributors' Section, p. 117, for biographical data.

[1] 60 U.S. (19 Howard) 691 (1857).

[2] 163 U.S. 537 (1896).

Negroes from white persons in trains, was not unconstitutional. The case arose only approximately thirty years after the close of the Civil War, when many white people, including some judges, were perhaps not as yet reconciled to the proposition that Negroes are citizens with the civil rights of citizens. The only mention of schools was a statement in the majority opinion of the Court, by way of argumentative dicta, that certain state courts had upheld segregation of Negoes and whites in their schools, and that such segregation had been practiced in the schools of the District of Columbia without the constitutionality thereof seeming to have been questioned. It must be borne in mind that at that time public education had not been advanced very far, there was little compulsory education, and it was not very long after the time when, as expressed in *Brown v. Board of Education, infra,* "any education of Negroes was forbidden by law in some states."

A dissenting opinion in the *Plessy vs. Ferguson* case was rendered by Associate Justice John M. Harlan. In the course of his dissent he used the following deathless language:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.
>
> * * * * * * * * * *
>
> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.

This "separate but equal" doctrine, though actually decided only with regard to transportation, was thereafter for many years assumed by the courts to uphold laws providing for the segregation of the races in the public schools; but such long acquiescence could not permanently crush the truth expressed in the above language from the Harlan dissent.

Then came the case of *Brown vs. Board of Education*[3] decided on May 17, 1954. The Supreme Court, while not specifically mentioning Justice Harlan's dissent, clearly vindicated its prophetic language. The Court decided that the segregation of children in public schools, solely on the basis of race, even though the physical facilities and other tangible factors may be equal, brands the children of the minority group with the stigma of inferiority and deprives them of equal educational opportunities. The Court concluded that in the field of public education the doctrine of "separate but equal" has no place, and that segregation in the

[3] 347 U.S. 483 (1954).

public schools deprives the Negro children of that equal protection of the laws guaranteed them by the Fourteenth Amendment.

Chief Justice Warren wrote the opinion. Some commentators have spoken sneeringly of this decision as made by the "Warren court", as though that were some sort of a vile epithet; but it must be borne in mind that the opinion was the unanimous decision of all members of the Supreme Court. As a senior member of the bar, I salute the members of our Supreme Court for having the courage to uphold the Constitution despite the prospect of bitter criticism from some sources.

The indisputable facts of history show that the decision carries out honestly and fearlessly the very purpose and soul of the Fourteenth Amendment to our Constitution. When a Negro man is heavily taxed to support a school, at peril of having his home sold if he does not pay the tax, then if his child is excluded from attending that school, solely because of his race, who could claim with mental honesty that he and his child are not denied the equal protection of the laws? When critics complain that this decision violates states' *rights*, the answer is that it only rectifies states' *wrongs*.

I make no claim that the Supreme Court's recent decisions have completely solved the Negro problem. That problem will have to be further solved in the hearts and minds of the white people, and the good sense and reasonable patience of the colored people. If some whites feel that the problem is extremely difficult to deal with, perhaps a disinterested person living on another continent might feel that some measure of just retribution is at work, because whites were the ones who brought the Negoes to this continent under the lash and in chains. At any rate, we must now find ways and means to abide by our Constitution.

Any white parents who have trouble in reconciling themselves to the thought of Negro children and white children being taught in the same public schools, must face the fact that the only alternative would be to change the Fourteenth Amendment of our Constitution. I seriously doubt that any considerable number of conscientious white persons would want to change that amendment so as to state that: "No state . . . shall deny to any person within its jurisdiction, *except a Negro*, the equal protection of the laws."

Please let us not lapse into unwarranted criticism of a Supreme Court that has had the courage to apply the Fourteenth Amendment in accordance with its true meaning and intent. Some other minorities may well need the protection of like judicial courage as time marches on.

Tax Aspects of Widow's Election

JOHN B. CHRISTIAN*

Recently estate planners in community property states have been making frequent use of the widow's election.[1] The widow's election usually takes the form of an express provision in the husband's will whereby the husband devises all the community propetry including his own and his wife's interest to a testamentary trust, giving the wife a life estate in this trust and the remainder to some third person or persons on the condition that the wife elects to take under the husband's will.[2] If the wife fails to make this election she takes nothing under the will of the husband and retains her one-half interest in the community property. For purposes of this discussion it will be assumed that the option is clearly set out in the husband's will and no prior agreement was reached between the husband and the wife concerning the wife's right to elect under or against the husband's will. Such a prior agreement may have the effect of limiting the widow's right of election.[3]

Several reasons exclusive of possible advantages have promoted this device. Because the wife is generally inexperienced in the handling of business affairs there has been an effort to place the management of the community estate in the hands of financial institutions and competent business acquaintances of the family so as to relieve the surviving wife of the responsibility and to assure capable management. Often the community is composed of one property or interest such as a family owned retail or small manufacturing operation. Under these circumstances it is usually desirable that the management and ownership remain undivided and that there be a continuity of operation. Fear that the wife will dissipate the family fortune through a long widowhood or a second marriage also makes it desirable to place control and investment in the hands of some third person. In many cases it is necessary that the widow receive the income from the entire community estate if she

* See Contributors' Section, p. 117, for biographical data.

[1] For a general discussion of the widow's election in community property states, see 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 217 (1943).

[2] For the proper method to draft the widow's election and a discussion of further refinements of the widow's election as an estate planning tool see Brawerman, *Drafting a Will with Widow's Election*, 1956 So. CALIF. TAX INST. 359. See Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958) for the results of what was probably an attempt to draft a widow's election.

[3] Authority for property agreements between husband and wife exists in several community property states: CAL. CIV. CODE § 158 and WASH. REV. CODE § 26.16.120 (1952).

is to maintain the standard of living to which she is accustomed. By use of the widow's election it is possible to avail the widow of the entire income yet place control of the community property with a person selected by the husband.

Little use has been made of this device in the wife's will because there are simpler methods to satisfy the needs of the estate. The wife can create a testamentary trust in her will making the husband trustee of the trust and giving him a life estate in the trust with a remainder over to whomever she may select. In this manner the management remains in the sole hands of the husband and yet he is unable to reach the principal of the deceased wife's one-half interest in the community property.

Several recent cases in the tax court and the court of appeals have brought to light certain possible tax advantages from use of the widow's election.[4] It is well established that upon the husband's death and the wife's election to take under the terms of the will the wife's half of the community is not includible in the husband's gross estate for tax purposes.[5] It is the wife's election not the deceased husband's power of disposition that permits the husband to dispose of the widow's share of the community property by his will.[6] As a consequence the husband's gross estate includes only his share of the community which is that property over which he possesses a power of disposition.

However there is a transfer of property rights involved with respect to the widow's half of the community. The transfer is one from the widow to the testamentary trust created in the husband's will. The widow is giving up all her rights in her half of the community except for what is in effect the retention of a life interest. So in essence the widow has transferred by her election a remainder to whomever is entitled to the remainder of the testamentary trust. In return for surrender of the remainder the widow receives a life interest in the testamentary trust represented by the husband's contribution to the trust principal.[7]

[4] Commissioner v. Siegel, 250 F.2d 339 (9th Cir. 1957), affirming 26 T. C. 743 (1956); Chase National Bank, 25 T.C. 617 (1956), reversed on other grounds by Commissioner v. Chase Manahattan Bank, 259 F.2d 231 (5th Cir. 1958). However, the court of appeals in the latter case states: "Weighing the language of the will and all the circumstances, we agree with the taxpayer that the will did not put Marie to an election and she made no effort to elect. Accordingly, Marie made no taxable transfer of her share of the community. It is still in her taxable estate."

[5] Pacific National Bank of Seattle, 40 B.T.A. 128 (1939) Coffman-Dobson Bank & Trust Company, 20 B.T.A. 890 (1930).

[6] DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY §§ 198 and 202 (1943).

[7] Although the widow receives a life interest from all the corpus of the trust what she actually receives in return is only the life interest from the husband's contribution to corpus. The widow was already in possession of a life interest in her share of the community which is now a part of the trust corpus. The importance of this distinction becomes apparent when considering the estate tax consequences upon the widow's death.

The first case construing the tax consequences of this transaction was Chase National Bank, 25 T.C. 617 (1956), see note 4, which has since been reversed on other grounds in Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958). This case as interpreted by the Tax Court involved three trusts, two of significance for this discussion, one inter vivos and the other a testamentary trust. The deceased husband had created an inter vivos trust, reserving to himself the income, then to his wife for life upon his death. The trust was composed of community funds. Because the husband retained plenary powers to revoke, and in effect, the right to deal with the corpus as though no trust had been created, the court deemed the inter vivos trust to be a testamentary transfer purportedly including his wife's interest as well as his own.[8] Under the Tax Court's interpretation of Texas community property law such a testamentary disposition was not considered binding on the wife. She could either retain her interest in the community or accept the terms of the trust. It was said that the widow acquiesced to the terms of the trust by accepting payments of income paid to her by the trustee. The court held that the surrender of her interest in the community property constituted a taxable gift to the trust under section 1002 of the Internal Revenue Code of 1939.[9]

However it was recognized that there was "consideration in money or money's worth" for the widow's surrender of her interest in the community property and this consideration was the life interest in the trust from the husband's contribution to the corpus.[10] To illustrate: if the community property has a value of 400,000 dollars at the time of the husband's death, each spouse's vested interest in the community is 200,000 dollars. The husband's gross estate is 200,000 dollars. Assuming the life interest in the husband's share of the community is 50,000 dollars, this amount is the "consideration in money or money's worth" for the widow's transfer of her half of the community property less the retained life estate. The value of this remainder interest is 150,000 dollars. The amount of the taxable gift is 100,000 dollars, the 150,000 dollar remainder less the 50,000 dollar life interest in the husband's half of the community property. It can readily be seen that if the wife is young at the time

[8] It was on this basis that the court of appeals reversed the tax court. The court of appeals found that the husband did not purport to transfer the entire community property by his will but rather disposed only of his share of the community. This, of course, would make the use of a widow's election impossible.

[9] Now INT. REV. CODE of 1954 § 2512.

[10] INT. REV. CODE of 1954, § 2512 provides that where property is transferred for less than adequate and full consideration in money or money's worth there is a taxable gift only to the extent by which the value of the property transferred exceeds the value of the consideration. The gift tax could be avoided by giving the widow a general power of appointment over her share of the community in the trust corpus, U.S. Treas. Reg. § 25.2511-2; Burnet v. Guggenheim, 288 U.S. 280 (1932); Hesslein v. Hoey, 91 F.2d 954 (2nd Cir. 1937); Estate of Sanford v. Commissioner, 308 U.S. 39 (1939).

of the husband's death the actuarial value of the life interest could equal or exceed the value of the remainder. In such case there would be no taxable gift because the consideration for the widow's election would be sufficient.

This holding of the tax court applied with all the more force to the testamentary trust which provided that all rights in the testamentary trust were in lieu "of dower and any and all other provisions statutory or otherwise for her benefit as my widow". Her rights under this trust were the same as under the former trust, a life interest. Commissioner v. Siegel, 25 F.2d 339 (9th Cir. 1957), affirming 26 T.C. 743 (1956), expressly followed the Chase National Bank case. The deceased husband had provided in his will for a testamentary trust composed of a majority of the community assets and for a specific bequest of 35,000 dollars to the widow. If the deceased's widow elected not to take under the will, but rather retained her share of the community property, the husband's share of the community passed to a testamentary trust in which the widow would possess no interest. The widow was therefore confronted with a clear-cut choice and after deliberating with her attorney and financial adviser she executed a written election to take under the will. In the tax court opinion the court reaffirmed the position that they had taken in the Chase National Bank case saying, "We have recently enunciated the basic principles applicable to situations of this type in Chase National Bank, 25 T.C. 617. It is clear from a reading of that case that petitioner must be considered as having made a gift to the extent that the value of the interest surrendered in her share of the community property exceeded the value of the interest she thereby acquired under the terms of Irving's will. If the petitioner received more than she surrendered then, of course, no gift has been made. Our task, therefore, is to determine the value of what she received for what she gave up."

Thus in both cases the widows' elections were considered transfers made for an insufficient consideration, not in the ordinary course of business. Such a transaction is taxable to the extent the value of the property transferred exceeds the value of the consideration. These transfers are reached by the gift tax irrespective of the common law concept of gifts and the presence or lack of donative intent.[11] Where, however, the transaction is one in the ordinary course of business, that is a transaction which is bona fide, at arm's-length, and free from any donative intent, no tax is imposed regardless of the actual value of the properties exchanged. Such a transaction is considered as made for an adequate and full consideration in money or money's worth.[12]

[11] INT. REV. CODE of 1954, § 2512; U.S. Treas. Reg. § 25.2512-8; Commissioner v. Wemyss, 324 U.S. 303 (1945).
[12] U.S. Treas. Reg. § 25.2512-8; Estate of Anderson, 8 T.C. 706 (1947).

Under the proper circumstances the business transfer rule appears applicable to the widow's election.[13] It is possible that the widow may be motivated to make the election to take under the will by purely economic considerations in that the life income from the entire community estate appears to her more attractive than the retention of her share of the community irrespective of to whom the remainder passes and the actuarial values involved. In such cases the rule concerning transactions made in the ordinary course of business seem applicable, therefore relieving the transaction from any tax liability. Ordinarily, however, the remainder in the testamentary trust goes to a person to whom both the husband and wife would wish to pass their estate upon death.[14] In fact, the life interest in the husband's share of the community may furnish but a slight inducement for her to elect under the will. It is probable that she would eventually transfer her share of the community to these same persons, either at her death or during her lifetime, especially, as would be the usual case, where children are the recipients of the remainder.

Herein seems to lie the major defect in a failure to tax the entire value of the remainder upon the widow's election. Is this a transfer or disposition of property for a consideration, either sufficient or insufficient? Can it be said that the two transfers are in consideration of each other when the widow's election is solely or primarily prompted by the desire to pass the family fortune on to her natural heirs? No doubt the use of the widow's election makes more certain the widow's decision to transfer her share of the community to those who are in most cases the natural objects of the couple's bounty, but it isn't the moving impulse. In these situations the widow's election only creates the false appearance of a transaction for a consideration.

This defect seems to offer the best approach for the commissioner. The courts have been most ready to look beyond the facade of family transactions and inquire into the reality of the circumstances. This would involve an examination into the subjective intent of the widow

[13] See LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES 747-749 (1956), for a discussion of the application of the business transfer rule to transfers unconnected with any business, however, where transfer is made for an economic advantage. The following cases have applied the business transfer rule to situations unconnected with any business: Beveridge, 10 T.C. 915 (1948); Farrell 13 T.C.M. 239 (1954); Chase National Bank, 12 T.C.M. 455 (1953); Lampert, 15 T.C.M. 1184 (1956); Shelton v. Lockhart, 154 F. Supp. 244 (W.D. Mo. 1957); Rosenthal v. Commissioner, 205 F.2d 505 (2nd Cir. 1953). The taxpayer made this contention in the *Chase National Bank case*. The tax court disposed of the contention as follows, "We are satisfied from the entire record, however, that there was no such arm's-length relationship of persons bargaining one with the other 'in the ordinary course of business' ".

[14] This was the situation in the *Siegel* case. The remainderman of the testamentary trust was an adopted child of the deceased husband and wife.

on each occasion, a burdensome and time consuming duty for the courts.[15] The result appears obvious if the remainder passes to the couple's children and at the other extreme to a paramour of the husband. Between these two extremes lie transfers induced by a multitude of motives. In many cases the widow herself may not be able to analyze her own motives and a determination of the dominant motive by the court might be sheer conjecture. Nevertheless, the suggested solution, in the absence of legislative action, conforms more with the purpose and functions of the gift tax than a mechanical deduction of the life interest as consideration from the value of the remainder in the widow's share of the community.[16]

The widow's election may offer an excellent estate planning device in view of the possible tax consequences at the time of the widow's death.[17] The taxpayer may be able to contend successfully that the widow's gross estate will include only the amount by which the widow's share of the corpus of the trust exceeds the value of the life interest in the husband's share of the corpus. Under section 2043(a) of the 1954 Code the basis for such a contention lies:

> SEC. 2043. TRANSFERS FOR INSUFFICIENT CONSIDERATION
>
> (a) In general — If any one of the transfers, trusts, rights, or powers enumerated and described in sections 2035 to 2038, inclusive and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of the death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

Thus it would appear as though under section 2043 the gross estate of the widow upon her death would include the fair market value of the property transferred (the remainder in the widow's share of the community) less the "consideration in money or money's worth" which in

[15] The courts have undertaken this duty in the cases involving transfers in contemplation of death. In each case the court must determine the subjective intent of the donor. See LOWNOES & KRAMER, FEDERAL ESTATE AND GIFT TAXES 69-73 (1956).

[16] For a criticism of these cases see Westfall, *Estate Planning and the Widow's Election*, 71 HARV. L. REV. 1269 (1958) and for a favorable comment see Weingarten, *Gift and Estate Consequences of Widow's Election in Community Property States*, 42 A.B.A.J. 1163 (1956).

[17] The commissioner undoubtedly will contend that all the widow's share of the community now in the corpus of the trust is includible in her gross estate. The basis of this contention lies in INT. REV. CODE of 1954, § 2036(a). This section includes in the decedent's estate all property decedent transferred in which he retained a life interest.

this case is the value of the life interest in the husband's half of the community. Using the same figures as in the prior example and assuming there was no change in the market value of the trust corpus there would be 150,000 dollars includible in the widow's gross estate. So in effect the widow has passed a 200,000 dollar estate to the remaindermen and has subjected her estate to a tax on only 150,000 dollars.

Assuming the tax court's interpretation of consideration under section 1002 of the Internal Revenue Code of 1939 to be sound then the life interest in the husband's half of the community should also be consideration under the terms of section 2043. What is consideration under section 1002 should be consideration under section 2043.[18] And if, in addition, the testamentary trust received part or all of the husband's separate property, if he possessed any, as consideration for the transfer, the consideration may be fully adequate in which case there would be no estate tax at her death.[19] Sections 2035 to 2038 provide for express statutory exceptions with respect to bona fide sales for an adequate consideration.

So we see that in addition to its other attributes the widow's election may offer a tax advantage in community property states.[20] In no event will the taxes be greater than if the wife had created a separate, inter vivos trust retaining a life interest in herself or if she leaves her share of the community directly by will.[21] If there is a successful attempt to exclude all or part of the widow's contribution to the testamentary trust from her gross estate it is possible that Congress will take legislative action to close the gap. The Tax Advisory Group of the American Law Institute has already recommended that the law should be amended to provide that a life estate in the husband's property should not be deemed consideration received by the wife in exchange for a transfer made by her.[22]

[18] Consideration under the estate and gift tax acts prior to the 1954 Code was considered to have the same meaning, Merrill v. Fahs, 324 U.S. 308 (1945).

[19] In the *Siegel* case the husband bequeathed a sum in cash to the widow from his share of the community. This sum was also deemed to be consideration for purposes of section 2512 of the 1954 Code so it would seem that a bequest from separate funds would likewise be deemed consideration. It must be noted that a devise of the husband's separate property to the testamentary trust would not qualify for the marital deduction, INT. REV. CODE of 1954, § 2056.

[20] For a discussion of the use of the widow's election in common law property states and the resulting tax consequences see Westfall, *Estate Planning and the Widow's Election*, 71 HARV. L. REV. 1269 (1958) and Brown, *The Widow's Election as a Tax-Saving Device*, 96 TRUSTS AND ESTATES 30 (1957).

[21] See Cohen, *Drafting Tax Clauses in a Will — Acquisition of Surviving Spouse's Interest in an Estate*, 1957 SO. CALIF. TAX INST. 549 for a comment on the tax consequences of the widow's election and a discussion of alternative plans.

[22] ALI Federal Income, Estate & Gift Tax Statute 40 (Tent. Draft No. 11, 1956). This group proposed this recommendation be added if the *Chase National Bank* case was affirmed.

Discovery of Attorney's Work Product

ALFRED J. PFISTER*

The availability of material gathered by an attorney in preparation for litigation under the deposition and discovery provisions of the Arizona Rules of Civil Procedure[1] was considered for the first time in *Dean v. Superior Court*.[2] The plaintiff, suing for injuries sustained in an automobile accident while a guest in defendant's car, requested production under Rule 34[3] of *inter alia* written statements of witnesses and memoranda setting forth the substance of oral statements of witnesses in the possession, control or custody of the defendant. The trial court granted plaintiff's motion, and the defendant sought a writ of prohibition to restrain the trial court from enforcing its order for production. The Supreme Court of Arizona found prohibition to be the proper remedy[4] and granted the writ.

The decision adopts the rationale of *Hickman v. Taylor*[5] by requiring written statements of witnesses taken by an attorney to be produced for inspection and copying upon a showing of good cause. The requirement of good cause is extended to written statements of witnesses taken by a third party and turned over to the attorney by citing with approval *Alltmont v. United States*.[6] Not all Federal District Courts are in agreement with the *Alltmont* case in applying the *Hickman* doctrine to written statements of witnesses not taken by an attorney.[7] Little could be added to the comprehensive analysis of decisions involving this problem made by Professor Moore.[8] It is enough to say that the *Dean* opinion is not in accord with his views.

A more significant aspect of the *Dean* case is the basis on which

* See Contributors' Section, p. 117, for biographical data.

[1] Rules 26-37, Ariz. Rules of Civil Procedure, 16 A.R.S.

[2] 84 Ariz. 104, 324 P.2d 764 (1958).

[3] Rule 34, Ariz. Rules of Civil Procedure, 16 A.R.S. provides: "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(c), the court in which all the action is pending may: 1. Order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, . . . not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody or control." The rule is identical to Rule 34, Federal Rules of Civil Procedure, 28 U.S.C.

[4] Only final orders are appealable in Arizona and such an order is not a final order.

[5] 329 U.S. 495 (1947).

[6] 177 F.2d 971 (3d Cir. 1949), certiorari denied 339 U.S. 967 (1950).

[7] MOORE'S FED. PRACTICE, par. 26.23(8), (2d Ed. 1950).

[8] *Ibid.*

the plaintiff's request for memoranda of oral statements made by witnesses was denied. The Court held that such memoranda were absolutely immune from inspection. Although the concurring opinion in the *Hickman* decision is cited as support for the immunity,[9] the holding shuts a door left partially open in the *Hickman* case when the United States Supreme Court suggested that in "rare situations" the production of such memoranda may be justified.[10] Two arguments are presented in support of the holding. First, that the memoranda by their very nature lead to inaccuracies resulting in confusion and misinterpretation rather than to the presentment of the truth, and second, that if the memoranda contained facts inconsistent with the testimony in chief of the witness who made the oral statement, the attorney to whom the statement was made could be called upon to impeach the witness. While the arguments presented warrant permitting inspection only in rare situations, it is submitted that to close the door entirely may necessitate an awkward re-opening in the face of a strong showing of necessity. Situations are conceivable in which the only possible means by which facts or leads thereto could be discovered would be by permitting inspection of memoranda made of oral statements of a witness.[11]

In light of the holding as to memoranda of oral statements of witnesses it is not surprising that the Arizona Supreme Court in dicta extends the absolute immunity to:

> . . . the work product of the attorney prepared in anticipation of litigation which concerns memoranda, briefs, and writings prepared by cousel for his own use, as well as related writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories . . .[12] (Note: hereafter the term "work product" will be confined to the above material.)

The Court reasons that it doesn't matter whether the basis for the immunity is privilege or public policy, but it is essential to an orderly working of our system of legal procedure. No authority is cited in support of the absolute immunity, indeed, no Federal cases providing for more than a conditional immunity are to be found. However, such an immunity was provided for by the Advisory Committee on the Rules of Civil Procedure in their proposed but unadopted amendments to Rule

[9] 324 P.2d 764, 769 (1958).
[10] Hickman v. Taylor, 329 U.S. 495, 513 (1947).
[11] Assume W is the only witness to an accident between P and D in which both P and D are immediately killed. An attorney representing P's estate takes the oral statement of W two days after the accident. A day later W dies before his written statement or disposition can be taken.
[12] Dean v. Superior Court, 324 P.2d 764, 769 (1958).

30(b).[13] Although the *Dean* opinion is the only case which suggests such an absolute immunity, it is probable that all courts under the Federal Rules of Civil Procedure would require an exceptionally strong showing of necessity before permitting inspection of the work product if inspection would be permitted at all.

A possible alternative to allowing inspection of the work product and memoranda of oral statements is to permit discovery of facts contained therein and otherwise unavailable by interrogatories to parties under Rule 33.[14] It appears to be well settled that information gathered by an attorney may be discovered by interrogatories to parties although the information sought has not been communicated by the attorney to the party.[15] The decisions are not clear nor in agreement on whether the good cause requirement extends to information sought under Rule 33.[16] The principal case rejects the rationale of *DeBruce v. Pennsylvania Railroad Co.*[17] which allowed a request that copies of written statements of witnesses taken by third persons be attached to answers to interrogatories without a showing of good cause. The *DeBruce* case reasons that since the substance of the statements may be obtained by interrogatories without a showing of good cause, copies of the statements could also be obtained. It can be argued that by rejecting the *DeBruce* holding the Arizona Supreme Court has impliedly indicated that good cause must be shown before the substance of written statements of witnesses taken by third persons can be obtained by interrogatories, a fortiori as to written statements taken by an attorney, memoranda of oral statements and the facts referred to in the work product. Would the immunity imposed on memoranda of oral statements and the work product preclude discovery of facts referred to therein by interrogatories? Assuming a showing of necessity is required and satisfied it is doubtful whether a refusal to answer interrogatories could be based on the contention that since the answers would come from memoranda of oral statements or the work product the questions need not be answered.

[13] Advisory Committee on Rules for Civil Procedure Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States 39-40 (1946), 5 F.R.D. 456. For a discussion of this and other proposed amendments to the deposition and discovery provisions of the Rules see, Tolman, *Discovery Under the Federal Rules; Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498 (1958).

[14] Rule 33, Ariz. Rules of Civil Procedure, 16 A.R.S.—allows serving of interrogatories to the opposing party after the commencement of the action and without leave of court. The Rule is the same as Rule 33, Fed. Rules of Civil Procedure, 28 U.S.C.

[15] Hickman v. Taylor, 329 U.S. 495, 504 (1947); State of Maryland to use of Peters v. Baltimore & O.R. Co., 7 F.R.D. 666 (E.D. Pa. 1947); see also MOORE'S FED. PRACTICE, *supra*, note 7, pp. 1131-1132.

[16] *Supra*, note 14.

[17] 6 F.R.D. 403 (E.D. Pa. 1947).

To so hold would seem to defeat or unduly limit the spirit of Rule 33.[18] This is not to say that mental impressions, conclusions or legal theories of the attorney could be discovered by interrogatories as discovery should be limited to facts.

The answer to what is good cause is not a settled one, and the good cause concept has been confused by decisions stating that the *Hickman* doctrine requires more than good cause.[19] It is submitted that the *Hickman* doctrine is: that good cause is required before non-privileged and relevant material gathered by an attorney in preparation for litigation may be inspected under the deposition and discovery procedure of the Federal Rules of Civil Procedure. This is not to say that the same showing which would permit inspection of written statements of witnesses taken by employees of the party in the usual course of business at or near the accident would warrant inspection of memoranda of oral statements of witnesses made to an attorney, assuming no immunity. What is good cause should be a function of what is sought.[20]

The *Dean* opinion by its holding rejects suggestions by other courts that the fact the movant was hospitalized after the accident and not represented by counsel and therefore unable to obtain statements from witnesses shortly after the accident is a sufficient showing to permit inspection of statements of witnesses taken by someone other than an attorney, even though the witnesses are available and willing to make a statement at a later date. The cases so stating argue that the statements made by witnesses shortly after the accident are more reliable than later statements, and since this version of the accident cannot be obtained elsewhere by diligent efforts, inspection of the statements should be permitted.[21] However, the position taken by the principal case is not without support.[22]

If the witness whose written statement had been taken was no longer available, or could be reached only with difficulty, or if available, was hostile, most courts would permit inspection.[23] There have been only a few cases deciding when a witness is unavailable and what is a sufficient showing of hostility. The mere fact that a witness is not within the state is not a sufficient showing of unavailability,[24] but the fact that witnesses were in Europe has been considered in allowing inspection of their written statements.[25] If the court lacks personal juris-

[18] *Supra*, note 14.
[19] Scourties v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (D.C. Ohio 1953).
[20] McCormick on Evidence, 1954 § 100, pp.208-209.
[21] DeBruce v. Penn. Railroad Co., 6 F.R.D. 403 (E.D. Pa. 1947).
[22] Goldner v. Chicago & N.W. Ry. System, 13 F.R.D. 326 (N.D. Ill. 1952).
[23] Hickman v. Taylor, 329 U.S. 495 (1947); Dean v. Superior Court, 324 P.2d 764 (1958).
[24] Lester v. Isbrandtse Co., 10 F.R.D. 338 (S.D. Texas 1950); Berger v. Central Vermont Ry. Inc., 8 F.R.D. 419 (D. Mass. 1948).
[25] Royal Exchange Assur. v. McGrath, 13 F.R.D. 150 (S.D. N.Y. 1952).

diction so as to compel compliance with Rules 26[26] and 31,[27] a diligent effort would not necessarily be fruitless as the witness may voluntarily comply. Therefore, if the whereabouts of the witness is known, good cause should require a showing that he would not voluntarily make a statement.

The refusal of a witness to make a voluntary statement should be considered as some evidence of hostility[28] especially where the witness is an employee of the opposing party,[29] or a relative or has a financial interest in the adversary's cause. There is, however, a certain reluctancy on the part of all witnesses to submit themselves to examination by an attorney, and it would therefore seem necessary to show that the witness refused to make a voluntary statement after being informed that his appearance could be compelled. Such a showing would seem to make actual compulsion, which would probably increase hositilities, unnecessary.

Many courts suggest that where the witness' deposition has been taken his written statement may be examined for purposes of impeachment and determining his credibility.[30] Although there are not many cases actually allowing inspection on this basis, it appears that the mere fact the witness' deposition has been taken is not in itself sufficient. There must be some ground to suspect that the disposition contains statements inconsistent with those made to the opposing party.[31] If the deposition contains statements on material matters inconsistent with statements of other witnesses or with answers to interrogatories to parties, there should be sufficient grounds for ordering production of the statements.

[26] Rule 26, Ariz. Rules of Civil Procedure, 16 A.R.S. provides for taking the deposition of any person, including a party by oral examination or written interrogatories after commencement of the action and without leave of the court. This Rule is substantially the same as Rule 26, Fed. Rules of Civil Procedure, 28 U.S.C.

[27] Rule 31, Ariz. Rules of Civil Procedure, 16 A.R.S. provides for the taking of depositions of any person upon written interrogatories. This Rule is the same as Rule 31, Fed. Rules of Civil Procedure, 28 U.S.C.

[28] Hanke v. Milwaukee Electric Ry. & Transport Co., 7 F.R.D. 540 (E.D. Wis. 1947).

[29] Brookshire v. Penn. Ry. Co., 14 F.R.D. 154 (N.D. Ohio 1953).

[30] See note 22.

[31] Hauger v. Chicago Rock Island & Pacific R.R. Co., 216 F.2d 501 (7th Cir. 1954); Martin v. Capital Transit Co., 170 F.2d 811 (D.C. Cir. 1948).

ARIZONA LAW REVIEW

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SURVEY OF 1958 ARIZONA CASE LAW

PART I

Part II of the Survey of 1958 Arizona Case Law will be published in the Fall, 1959 issue of the ARIZONA LAW REVIEW.

Administrative Law and Procedure

WILLIAM D. BROWNING

Delegation of Power

McDaniel v. State Board of Technical Registration[1] presented the Court with the question of whether or not there had been a constitutional delegation of power to the administrative agency. The case is a companion to *State v. Beadle*[2] and *State Board of Technical Registration v. Bauer*.[3] All three involve a construction of the Technical Registration Act, hereinafter called the Act.[4] Insofar as the administrative law question was concerned, the *Beadle* case was disposed of by reference to the *McDaniel* and *Bauer* opinions.

In *McDaniel* the board was contemplating action of a disciplinary nature against the plaintiff, who applied for and obtained a writ of prohibition from the supreior court on the ground that the Act was not definite enough to establish a standard under which the board could proceed. The Court relied heavily on a Michigan case,[5] construing a similar statute, and held that in viewing the act as a whole it was not so vague and indefinite as to constitute an unlawful delegation of power. Holding that the Act sufficiently defined the rights, duties and privileges of the registrants and the board, the Court said:

> The leaving of details of operation and administration [to the board], within the standards set forth by the legislature, is not an objectionable delegation of legislative authority.[6]

Timing of Review

In *City of Tucson v. Simpson*,[7] the plaintiff obtained an award for damages based on his arbitrary and wrongful discharge from the employ

[1] 84 Ariz. 223, 326 P.2d 348 (1958). See also CONSTITUTIONAL LAW, *infra*.
[2] 84 Ariz. 217, 326 P.2d 344 (1958).
[3] 84 Ariz. 237, 326 P.2d 358 (1958).
[4] A.R.S. §§ 32-101 to 32-145.
[5] People v. Babcock, 343 Mich. 671, 73 N.W. 2d 521 (1955).
[6] The Court cited State v. Marana Plantations, 75 Ariz. 111, 252 P.2d 87 (1953) at this point, as well as other Arizona cases. In that case the delegation of powers question was raised and the Court held that there was an unlawful delegation of power within the meaning of the cases of Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). The rule as promulgated by these cases is considerably narrower than that found in Yakus v. United States, 321 U.S. 414 (1940). The federal courts and many of the state courts now follow the Yakus case as to requisite standards imposed by the legislature. In light of the cases decided by the Arizona Court since Marana Plantations, *supra*, it is believed that the rule in Arizona is now in accord with Yakus.
[7] 84 Ariz. 39, 323 P.2d 689 (1958).

of the defendant. The city charter provided for the establishment of a civil service commission and this commission had adopted rules for the taking of appeals in cases of this nature. Though the Court recognized the existence of a cause of action in the plaintiff, it held that the trial court had acted beyond its "jurisdiction" and, hence, its action was *void*. The Court reasoned that since plaintiff had failed to take an appeal within the prescribed period of time he had not exhausted his administrative remedies and therefore had no recourse to the courts.[8] The Court further held that the question of exhaustion of remedies may be raised in the Supreme Court though not raised in the court below.

Scope of Review

In *Dick v. Cahoon*[9] an appeal was taken to the Supreme Court from an order permanently enjoining the county board of supervisors from changing the boundaries of a school district. After a hearing on the matter, the board had issued such an order, pursuant to the authority conferred on it by statute, which provided that its action should be final.[10] The Court held that the record disclosed no reasonable basis for the board's action and that the board had abused the discretion conferred on it by the statute. In holding that the board's action was in excess of its "jurisdiction," hence *void*, the Court apparently applied the familiar rule that there must be "substantial evidence on the whole record" to support the findings of the agency.[11]

Method of Review[12]

In *State Board of Dispensing Opticians v. Carp*[13] mandamus was used as the vehicle for the review of the board action. The Court said that since the licensing statute itself provided for no method of review and the board had not rendered a decision from which an appeal could be taken under the Administrative Review Act,[14] this was a proper case

[8] The leading case on the "exhaustion" doctrine is Meyers v. Bethlehem Shipbuilding Co., 303 U.S. 41 (1938). Certain exceptions to this doctrine have been recognized in the state courts, as in Nolin v. Fitzpatrick, 9 N.J. 477, 89 A.2d 13 (1952). In general on this subject see DAVIS, ADMINISTRATIVE LAW (1951), §§ 182-96.

[9] 84 Ariz. 199, 325 P.2d 835 (1958).

[10] A.R.S. § 15-403. As to the effect of a statute purporting to make the action of the administrative agency final, see DAVIS, ADMINISTRATIVE LAW (1951) § 238.

[11] On the "substantial evidence" rule see DAVIS, ADMINISTRATIVE LAW (1951), 254; Universal Camera Co. v. N.L.R.B., 340 U.S. 474 (1951); Cooper, *The "Substantial Evidence" Rule*, 44 A.B.A.J. 945 (1958).

[12] See Carrow, *Types of Judicial Relief from Administrative Action*, 58 COLUM. L. REV. 1 (1958) for a recent article on this subject.

[13] 85 Ariz. 35, 330 P.2d 996 (1958).

[14] A.R.S. §§ 12-901 thru 914.

for mandamus to compel the board to act. Mandamus will lie to compel board action, when the statute requires it to act, yet the courts can not substitute their discretion for that of the board's. The Supreme Court reversed because the trial court had ordered the board to issue the license and this was a judicial invasion of the discretion given the board, not the court, by the legislature.

Mandamus was also used in the *Bauer* case, *supra*, where the plaintiff sought to compel the board to issue him a license. In this case it was held that mandamus was not available inasmuch as the board had rendered a final decision from which an appeal could be taken under the Administrative Review Act. Such an appeal provided a plain, speedy, and adequate remedy at law. In the *Carp* case, *supra*, the statute required that the board issue the applicant a license if it found that he possessed ". . . minimum basic skills . . ."[15] and the board had refused to act unless the applicant took an examination. The Court held that the board had to make a decision on this matter and this distinguishes the case from *Bauer* where the board had rendered a decision, thus making it reviewable under the Administrative Review Act. The Court pointed out that the applicant could, by later proceedings, test the board's discretion in complying with the writ.[16]

Smoker v. Bolin[17] was another case involving a writ of mandamus. The Supreme Court held that the relief asked for was in the nature of an injunction, and not to compel an official to act. While the Arizona Constitution conferred original jurisdiction on the Supreme Court in certain mandamus cases, it did not in the case of injunctions,[18] and the case was dismissed.

Certiorari was the prerogative writ used in the *Dick* case, *supra*, though it was granted by stipulation of counsel. The superior court, reviewing the case on certiorari, allowed the admission of certain sworn testimony in addition to the record sent up. Apparently no objection was made to this, though it appears questionable whether or not the testimony was properly before the court. Were the case heard under the provisions of the Administrative Review Act such testimony could be heard at the discretion of the court,[19] but it would seem that the provisions thereof would have no application where the case is before

[15] A.R.S. § 32-1683.
[16] The leading case on mandamus as a method of review of administrative action is United States *ex rel.* Greathouse v. Dern, 289 U.S. 352 (1933).
[17] 333 P.2d 977 (Ariz. 1958). See also ELECTIONS, *infra*.
[18] ARIZONA CONSTITUTION, Art. 6, § 4.
[19] A.R.S. § 12-910(A).

the court on certiorari.[20] The case of *Mercado v. Superior Court*[21] goes far toward holding that such evidence would be inadmissible, if it does not in fact so hold. To the effect that such evidence is inadmissible see the California case of *Grief v. Dullea.*[22] Since the question apparently was not squarely presented to the Court, nor arguel by counsel, it would seem that this point is still unsettled.

In the *McDaniel* case, *supra,* the Court held that a writ of prohibition was properly issued notwithstanding the fact that an appeal could have been taken under the Administrative Review Act. The Court said,

> . . . [prohibition will lie] . . . if it fairly appears to the trial court that in a given case the administrative agency is acting without or in excess of its jurisdiction and that an appeal will not furnish a plain, speedy and adequate remedy at law.

The Court said that an appeal is not in all cases an exclusive and adequate remedy at law for a registrant who wishes to attack the jurisdiction of the board. The Court held that the granting of the writ was discretionary with the trial court and the appellate court is limited to consideration of abuse of discretion, and that since the record disclosed no abuse of discretion here the writ was properly issued.

Fairness of Agency Action

In *Southern Pacific Co. v. Corporation Commission*[23] the Court held that due process demanded the commission grant the petitioner a new hearing inasmuch as it claimed new facts were available. Such new facts, if proved, might affect the reasonableness of the agency action, which was based on findings of fact two and one half years earlier. The matter is not res judicata as to such facts and the petitioner was entitled to a new hearing.

In *George v. Corporation Commission*[24] it was held that the administrative agency is bound by its own rules and regulations so long as they remain in force and effect, though it has the power to change these rules. Failure to comply with such rules was held to be arbitrary, capricious, and a usurpation of power that the agency does not possess, hence its actions were void and subject to collateral attack.

[20] In City of Phoenix v. Rodgers, 44 Ariz. 40, 34 P.2d 385 (1934) the Court held that when certain writs were specified in the Arizona Constitution, Art. 6 § 6, the common law writs were meant. The case dealt with a writ of prohibition. However, certiorari is also provided for in that section. Therefore, absent a statute to the contrary, the common law rules regarding certiorari would seem to be controlling.

[21] 51 Ariz. 436, 77 P.2d 810 (1938).

[22] 66 Cal. App. 2d 986, 153 P.2d 581 (1944). See also 10 AM. JUR., *Certiorari,* § 19 that evidence dehors the record is not permitted in the absence of statute.

[23] 83 Ariz. 333, 321 P.2d 224 (1958).

[24] 83 Ariz. 387, 322 P.2d 369 (1958).

In *Timmerman v. Lightning Moving and Warehouse Co.*[25] the appeal was from a decision of the Corporation Commission to "renew" a certificate which had, on its face, expired. Referring to the action of the commission, the Court said:

> . . . [this is] . . . a classic example of an abuse of office by the exercise of a power which the Commission did not possess.

The case was treated as one in which the commission acted wholly without authority and it was permanently enjoined from issuing the certificate.

[25] 83 Ariz. 398, 322 P.2d 376 (1958).

Agency

Al Cox

Loaned Servant

In *Larsen v. Arizona Brewing Co.*[1] plaintiff sought to hold defendant liable for the negligent act of a truck driver. Defendant was resurfacing a highway under contract with the state and subcontracted to have additional trucks furnished with drivers. One of the trucks and drivers so furnished was involved in a collision with plaintiff's vehicle.

A directed verdict for defendant was affirmed. Defendant's alleged violation of a contractual obligation to the state not to subcontract without written consent did not bring the case within any exception to the general rule that a party is not liable for the negligent act of an independent contractor or his servant. To impose vicarious liability upon defendant upon the principle of respondeat superior it must be shown that the negligent party was subject to defendant's control or right to control in the performance of the negligent act. There is an inference that a servant remains in the service of his general employer. Where there is no evidence to show that a master and servant relationship existed between defendant and the negligent third person the fact that such a relationship did not exist may be decided as a matter of law.

The case is in accord with the general rule[2] and that adopted by the *Restatement of Agency*.[3] An earlier Arizona case, *Lee Moor Contracting Co. v. Blanton*,[4] though cited by plaintiff in support of its contention that whether a master and servant relationship existed was a question of fact for the jury, supports the holding of the principal case when taken in its entirety.

[1] 84 Ariz. 191, 325 P.2d 829 (1958).
[2] Annot., 17 A.L.R.2d 1388, 1410 (1951).
[3] Restatement Agency 2d §§ 220, 227 (1958).
[4] 49 Ariz. 130, 65 P.2d 35 (1937).

Attorney and Client

ARTHUR MILLER

Settlement by Attorney Binding on Client

United Liquor Company v. Stephenson[1] arose as an action to quiet title to a claimed appurtenant easement. At the close of the evidence in the trial, counsel for both sides announced that a settlement had been reached. The case was removed from the calendar for about two weeks and in the interim, defendant went over the head of her attorneys and conferred with the trial judge who thereafter held that defendant did not understand the terms of the settlement and therefore was not bound by it. Judgment was entered for defendant, denying any relief to the plaintiff.

The question presented on appeal to the Supreme Court appeared to be whether or not a client could expressly authorize her attorney to settle a claim and then escape being bound by the settlement on the ground that she did not fully understand the terms thereof.[2] The Court, following the rule adopted in *Smith v. Washburn & Condon*,[3] held that as a matter of law, a client is bound by a compromise settlement of a lawsuit where he has given his attorney express authority to settle and the settlement is not grossly unfair.[4]

Waiver of Attorney-Client Privilege by Guardian Ad Litem

In *Lietz v. Primock*[5] the Court dealt with the question of whether or not a guardian ad litem could waive the attorney-client privilege in the same way that the mentally incompetent ward might were it not for his legal disability. The Court adopted the reasoning of *Yancy v. Erman*,[6] which would appear to be the only other United States case where this question has been decided.[7] The Ohio court in that case pointed out

[1] 84 Ariz. 1, 322 P.2d 886 (1958).

[2] It should be noted that the Supreme Court found defendant's testimony in the trial below inconsistent with at least some of the allegations as to her lack of understanding of the settlement.

[3] 38 Ariz. 149, 297 Pac. 879 (1931).

[4] The holding is in accord with the majority rule. 7 C.J.S. *Attorney and Client*, § 105(a) at 928.

[5] 84 Ariz. 273, 327 P.2d 288 (1958).

[6] 99 N.E.2d 524 (Ohio 1958).

[7] 97 C.J.S. *Witnesses*, § 307.

that the attorney-client privilege is intended to *protect the client* either by preventing his lawyer from testifying or by permitting him to do so, and that there would be no reason to discriminate against an incompetent by denying him a right which he might most seriously need.

The Ohio case differed slightly in that the waiver there permitted an attorney to testify as a witness for the defense in a suit brought against the incompetent, while in this case, the relationship was invoked by the attorney in a suit where the incompetent was plaintiff and the attorney was one of the defendants.

The Court also held that a confidential relationship of attorney and client creates an exception to the general rule that opinion statements may not serve as a basis for actionable fraud, where such opinion is tainted with an intent to gain some advantage over the client either for the attorney or for another.[8]

Disbarment

In the Matter of Herbert Watson[9] involved disbarment proceedings brought pursuant to Rule 33(c) of the Supreme Court of Arizona. The attorney was charged, in two counts, of commingling a client's funds with his own in violation of Canon 11 of the A.B.A., and with failure to properly protect the interest of a client in a quiet title action. The Supreme Court found the evidence sufficient to justify disbarment.

Attorney's Charging Lien

X, an attorney, agreed to represent Y as plaintiff in an action for malicious prosecution. As his compensation, X was to receive "a fee minimum time charge, with a retainer thereon, plus an additional contingent fee *in the event of collection of any judgment obtained*" of one-third of any monies so collected. The action resulted in a verdict and judgment in favor of the client for $15,000.

Shortly after obtaining judgment, Y, to keep the funds out of reach of numerous creditors, assigned his rights under the judgment to attorney Z and also to W.[10] Z collected the judgment and was immediately served with a writ of garnishment by one of Y's creditors. In spite of this, Z paid over the proceeds, less his expenses and charges, to W. In

[8] The weight of authority supports this view. RESTATEMENT TORTS, § 525 (1938); 37 C.J.S., *Fraud*, § 10; 23 AM. JUR., *Fraud and Deceit*, § 16; PROSSER, TORTS, § 90 (2d ed. 1955).

[9] 85 Ariz. 54, 330 P.2d 1091 (1958).

[10] These assignments, both of which purported to transfer all of Y's interest in the judgment, were held to have been in fraud of Y's creditors and hence void.

the garnishment action brought against Z by the garnishor, X intervened, claiming that he was entitled to one-third of the funds Z had collected by virtue of his (X's) attorney's lien for that portion.

In *Linder v. Lewis, Roca, et. al.*,[11] the Court said that an attorney has an equitable lien in a fund where it appears that the parties looked to the fund itself for payment of the attorney,[12] i.e., where it appears that it was the intent of the parties that an equitable lien should be created.[13] The Court held "that the assignment made did not in any manner affect the charge against the fund in favor of [X] . . . His interest in it as the person helping create the fund is paramount and superior to the rights of other persons."[14] Since Z, after garnishment, chose to abandon his position as stakeholder and paid out the funds pending adjudication of the rights of the plaintiffs therein, he may be held liable to the garnishor[15] and to X, the intervenor.[16]

[11] 333 P.2d 286 (Ariz. 1958). See also CREDITOR'S RIGHTS, *infra*.

[12] Button's Estate v. Anderson, 112 Vt. 531, 28 A.2d 404, 143 A.L.R. 195 (1942).

[13] Barnes v. Shattuck, 13 Ariz. 338, 114 Pac. 952 (1911), affirmed, Barnes v. Alexander, 232 U.S. 117, 34 S.Ct. 276, 58 L.Ed. 530 (1913).

[14] Anderson v. Star-Bair Oil Co., 34 Wyo. 332, 243 Pac. 394 (1926).

[15] Potter v. Whitten, 170 Mo. App. 108, 155 S.W. 80, 88 (1913).

[16] Since an attorney's charging lien on a fund is superior to the claim of an ordinary creditor because the attorney had a hand in the creation of the fund, does it follow that in the circumstances presented by this case, the attorney, as an intervenor, has a superior claim to the garnishor. Can it be said that the fund which the attorney helped to create was still in the hands of the party defendant? The Court did not have to answer this question since the fund garnished was sufficient to cover the claims of both the garnishor and the intervenor.

Constitutional Law

DON ESTES

Fair Trade Act

Fair Trade Acts generally allow a manufacturer to set a minimum price on trade marked goods without violating state anti-monopoly laws. A provision of these acts, the non-signer clause, binds retailers to the price in the contracts, even if they are not parties to the contract, if they have notice.

California adopted the first Fair Trade Act in 1931,[1] and since then, forty-five states have enacted similar statutes.[2] Arizona adopted its Fair Trade Act[3] in 1936,[4] basing it upon the California statute[5] and in two recent cases,[6] followed California[7] and the United States Supreme Court[8] in upholding the constitutionality of the act, as applied to signers in the case of *Everybody's Drug v. Duckworth*[9] and non-signers in *General Electric Co. v. Telco Supply.*[10]

The highest courts of twenty-seven states have had the question of the constitutionality of these acts before them,[11] with sixteen holding them constitutional and eleven striking them down. However, since 1952, Arizona becomes the fifth to uphold the act, while eleven have declared them to be unconstitutional.

The Arizona statute[12] was held to be not in violation of the anti-monopoly prohibition of the Arizona Constitution,[13] and a valid legislative declaration of economic policy.

Rotation of Names on Ballots

The State of Arizona has been rotating names on paper ballots since

[1] CAL. BUS. & PROF. CODE § 16900-05.
[2] Those who have not adopted such legislation are Missouri, Texas and Vermont. See 19 A.L.R.2d. 1139 (1951).
[3] A.R.S. §§ 44-1421, 44-1424.
[4] Historical Note, A.R.S. §§ 44-1421, 44-1424.
[5] *Supra,* note 1.
[6] General Electric Co. v. Toledo Supply, 84 Ariz. 132, 325 P.2d 394 (1958); Everybody's Drug Co. v. Duckworth, 84 Ariz. 141, 325 P.2d 400 (1958).
[7] Scovill Mfg. Co. v. Skaggs Pay-Less Drug Stores, 45 Cal.2d 881, 291 P.2d 936 (1955).
[8] Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).
[9] *Supra,* note 6.
[10] *Supra,* note 6.
[11] See Roger-Kent, Inc. v. General Electric Co., 99 S.E.2d 665 (S.C. 1957).
[12] *Supra,* note 3.
[13] ARIZ. CONST. Art. 14 § 15.

1912,[14] but until 1958, the candidates' names on voting machine ballots were required by statute[15] to be in alphabetical order. In *Kautenburger v. Jackson*,[16] this statute was held to violate the privileges and immunities clause of the Arizona Constitution.[17] The Court recognized the disadvantage and discrimination that would be shown a candidate by reason of his surname, and that the right to become a candidate for public office is a sufficient property right to be entitled to constitutional protection.

Qualifications for Office

A statute[18] prohibiting incumbents of elective offices from being eligible for nomination or election to any office other than the office so held, was found to be unconstitutional when applied to the office of Judge of the Supreme Court of Arizona. The appeal in the case of *Whitney v. Bolin*[19] was to declare an office of Judge of the Superior Court open for primary nominations when the incumbent became a candidate for Judge of the Supreme Court. The Court found the qualifications for Judge of the Supreme Court are enumerated specifically in the Arizona Constitution,[20] and the legislature is without authority to prescribe additional qualifications. The Court did not pass upon the effect of the statute when applied to any other public office.

Compensation in Condemnation Proceedings

Compensation awarded by a county board of supervisors does not preclude the property owner from seeking just compensation by a jury trial in condemnation proceedings. *Pima County v. Cappony*[21] decided that the statute[22] allowing the board to make compensation awards was not valid as the Arizona Constitution[23] provides for just compensation to be ascertained by a jury, as in other civil actions, and compensation from such a board is not the ascertainment for which the Constitution provides.

[14] Sec. 9, Ch. 84, L. '12, 1st S.S.
[15] A.R.S. § 16-551(C), 16-796.
[16] 333 P.2d 293 (Ariz. 1958). See also ELECTIONS, *infra*.
[17] ARIZ. CONST. Art. 2, § 13.
[18] A.R.S. § 38-296.
[19] 330 P.2d 1003 (Ariz. 1958). See also ELECTIONS, *infra*.
[20] ARIZ. CONST. Art. 7 § 13.
[21] 83 Ariz. 348, 21 P.2d 1015 (1958).
[22] A.R.S. § 59-601.
[23] ARIZ. CONST. Art. 2, § 17.

Police Pension Plan

The statutory provision[24] calling for forfeiture of pension compensation when a retired person receives a salary as an officer or employee of the state, a county, or municipality was upheld as a reasonable and rational classification in *Police Pension Board v. Denny*,[25] when the statute[26] was attacked as being discriminatory in depriving police officers of substantial and material rights enjoyed by other public employees. The Court said that to permit the retired officers to collect both the salary and the pension would be contrary to the spirit and purpose of all pension legislation.

Deposit of Public Monies

A statute[27] providing for deposits of public monies in qualifying banks, with active and inactive funds designated, and interest to be paid upon the inactive funds was held not a violation of the Arizona Constitutional prohibition of lending public credit.[28] In *Valley National Bank of Phoenix v. First National Bank of Holbrook*[29] the Court said merely because others are incidentally benefited by the deposits does not bring the transaction within the Constitutional provision as the purpose of the prohibition was to prevent the use of public funds, raised by general taxation, to aid enterprises engaged in private business. The historical background of the provision was the rational basis of the holding, with the Court explaining that it was to cover the abuses of public funds prevalent at the time the Constitution was enacted.

Right to a Hearing

The Corporation Commission, without notice, entered an order directing the Southern Pacific Company to install warning signals at its sole expense, following a decision of the Arizona Supreme Court.[30] The company appealed the order, and in *Southern Pacific Co. v. Corporation Commission*[31] the Court decided that the company had a right to a

[24] A.R.S. § 9-928 (A).
[25] 84 Ariz. 394, 330 P.2d 1 (1958).
[26] *Supra*, note 24.
[27] A.R.S. §§ 35-321 to 35-325.20.
[28] ARIZ. CONST. Art. 9, § 7.
[29] 83 Ariz. 286, 320 P.2d 689 (1958).
[30] Maricopa County v. Corporation Comm. of Arizona, 79 Ariz. 307, 289 P.2d 183 (1955).
[31] 83 Ariz. 333, 321 P.2d 224 (1958).

hearing on the question of whether or not a hazardous condition remained, to avoid transgressing the constitutional right of due process.

Definitions

In disciplinary proceedings against a structural engineer for professional misconduct, the Court, in the case of *State Board of Technical Registration v. McDaniel*,[32] held the statute[33] regulating these professions to be definite enough as not to violate due process. The distinction was found to be in the application of "architectural principles to an architect's services, and engineering principles to the engineering profession."[34] The Court said that with the rights and duties so defined, there could be no objection on the ground of indefiniteness.

Enjoining of Picketing

An order enjoining picketing was reversed in the case of *International Brotherhood of Carpenters and Joiners, Local 857 v. Todd L. Storms Construction Co.*,[35] as the statute[36] allowing such an order was declared unconstitutional in a decision[37] after the injunction was given.

A new trial was ordered to discover whether or not the union had a justifiable interest to protect by their picketing, as none of the employees were members of the union.

Double Jeopardy

The statute[38] allowing the state to dismiss a complaint and charge the defendant with a greater crime was held to be applied unconstitutionally in *Application of Williams*.[39] The defendant had been charged with second degree murder, the jury had been sworn, and the prosecu-

[32] 84 Ariz. 223, 326 P. 2d 348 (1958). See companion cases of State v. Beadle, 84 Ariz. 217, 326 P.2d 344 (1958), and State Board of Technical Registration v. Bauer, 84 Ariz. 237, 326 P.2d 358 (1958). See also ADMINISTRATIVE LAW AND PROCEDURE, *supra*.

[33] A.R.S. §§ 32-144, 32-101.

[34] Compare another recent decision on statutory construction, State v. Stockton, 333 P.2d 735 (Ariz. 1958) where Justice Phelps said in dicta, that to construe the term *animal* to include a gamecock would render the statute too vague and indefinite, and therefore in violation of the due process clause.

[35] 84 Ariz. 120, 324 P.2d 1002 (1958).

[36] A.R.S. § 23-1322.

[37] Baldwin v. Arizona Flame Restaurant, 82 Ariz. 385, 313 P.2d 759 (1957).

[38] A.R.S. § 13-1395.

[39] 333 P.2d 280 (Ariz. 1958). See also CRIMINAL LAW, *infra*.

tion had begun its case when the statute[40] was invoked and the defendant was then ordered held on a charge of first degree murder. The Court said since the evidence necessary for a conviction of second degree murder was also necessary for first degree the defendant had been placed in jeopardy twice, which violated the Arizona constitutional prohibition of double jeopardy.[41]

[40] *Supra*, note 39.
[41] ARIZ. CONST. Art 2 § 10.

Contracts

JOHN R. MCDONALD

Fraud in Inducement

What is the difference between a house and lot adjoining a burnt adobe service station and the same house and lot adjoining a service station constructed of brick and painted white? The plaintiff in *Lusk Corporation v. Burgess*[1] contended that there was sufficient difference upon which to predicate an action for fraud.

During the course of negotiations for the sale of a lot, defendant's agents told plaintiffs that a service station was going to be built on the lot across the alley but that it would be of burnt adobe and would conform to the architecture of the homes in the area. The agents further stated that a burnt adobe wall would be built between the two lots and that Texaco had already drawn the plans and were "all for it".

Six days after plaintiffs agreed to buy the lot, defendant conveyed the adjoining lot to third parties without restriction. Evidence indicated that negotiations for the transfer had been underway for a month before the representations were made to plaintiffs. A service station was subsequently built on the neighboring lot but it was constructed of red brick and was painted white, contrary to the surrounding architectural scheme. Barber and beauty shops were also built on the premises.

The Court, citing *Waddell v. White*,[2] had no difficulty in finding actionable fraudulent representations in the statements. Those relating to the intentions of Texaco were false and known to be false since the evidence showed that negotiations for the sale of the adjoining lot were commenced more than a month before the representations were made and were probably completed before plaintiffs executed their contract with the defendants. Those relating to Texaco's having already drawn the plans were also actionable, the Court found.

The measure of damages, the Court said, is the difference between the value of the property and the value it would have had if the representations had been true. Plaintiffs paid $15,030 for the property. Their expert witness testified that the property "as it sits now" was worth $13,000. He was unwilling, however, to attribute the entire difference to defendant's misrepresentations and was of the opinion that had the

[1] 332 P.2d 493 (Ariz. 1958).
[2] 56 Ariz. 420, 108 P.2d 565 (1940).

service station been built of burnt adobe as represented, the property would still not have a value of $15,000. On the basis of this testimony, the Court remanded the case for a new trial on the issue of damages, holding that plaintiffs had not proved the extent of damage to a reasonable *certainty*. Thus, the defendant procured a reversal on the rather embarassing position that even had its representations been true, the property was not worth the purchase price.

Broker's Contracts

A.R.S. § 32-2152 provides that a broker must be licensed in order to recover any commissions. In *James v. Hiller*[3] this provision was relied on as a defense to an action to recover on a broker's contract.

Plaintiff was licensed as a broker in New Mexico but not in Arizona. Defendant's land was in Arizona but the listing occurred in New Mexico and plaintiff acquired the purchaser in New Mexico. The purchaser later defaulted and defendant refused to pay plaintiff the balance of his commission.

A broker's contract is unilateral and the place of contracting is where the purchaser is acquired. The rights of the parties are determined by application of the law of the place where the contract was made. Thus, since the purchaser was acquired in New Mexico, the contract was made there and New Mexico law applied. The contract was valid in New Mexico, the Court held, and could therefore be enforced in Arizona.

In *Hassenpflug v. Jones*,[4] defendant, a real estate broker, purchased property under an assumed name of "Fletcher" and then purported, on behalf of her clients, the plaintiffs, to negotiate a purchase and sale of the property from "Fletcher" to the plaintiffs, and thus make a secret profit for herself. The Court held that plaintiffs need not rescind the contract with "Fletcher" as a condition to their right to recover damages from the defendant for the breach of a fiduciary relationship.

In *Mattingly v. Bohn*[5] the plaintiff was given the "sole and exclusive right" to sell defendants' property for a fixed period. Before the term of the contract expired defendants entered into a contract to sell the property to a third party and placed the deed in escrow. The buyers deposited $1,000 earnest money. In reversing the trial court, it was held that the plaintiff was entitled to recover damages measured by the amount of the agreed commission and that defendants' acts constituted a total breach of the contract, excusing the plaintiff from the necessity

[3] 85 Ariz. 40, 330 P.2d 999 (1958).
[4] 84 Ariz. 33, 323 P.2d 296 (1958).
[5] 84 Ariz. 369, 329 P.2d 1095 (1958).

of proving that he had a purchaser ready, willing and able to buy the property.

Forfeiture

Arizona Title Guarantee & Trust Co. v. Modern Homes[6] involved the effect of the acceptance of late payments in a contract for the sale of land in which time is stated to be of the essence.

Defendant held the deeds in escrow under land purchase contracts between plaintiff and various purchasers. On several contracts plaintiff had accepted late payments before the expiration of the periods provided in A.R.S. § 33-741 for forfeiture after default. In respect to these contracts the Court held that there had been no waiver of the "time is of essence" clauses and that plaintiff need not give notice of reinstatement before declaring a forfeiture. Before there can be a waiver, the Court said, there must be a right in existence at the time of the alleged waiver. Until the expiration of the statutory period, plaintiff was prevented by the statute from insisting on strict compliance with the clauses and could not declare a forfeiture until the period elapsed.[7] Thus, there was no waiver.

On the other group of contracts in question, plaintiff had accepted delayed payments after expiration of the grace periods provided by A.R.S. § 33-741 and could have, if it wished, declared a forfeiture. The "time is of essence" clauses were concededly waived, and the issue was the requirements for reinstatement of such clauses. As to these, the Court held that prior defaults were waived and a forfeiture could be declared only after the plaintiff gives the purchasers notice of intent to enforce the contract as written, a reasonable time to bring delayed payments up to date, and after expiration of a reasonable time, the additional period provided by the statute.[8]

Ambiguity

What is the meaning of the phrase "replacement new cost less depreciation"? In *Graham County Electric Cooperative, Co-op v. Town of Safford*[9] the validity of the contract turned on this phrase. The contract provided that if the Town of Safford extended its corporate limits, the then existing facilities of the Co-op in the area were to be sold to

[6] 84 Ariz. 399, 330 P.2d 113 (1958).
[7] Phoenix Title and Trust Co. v. Horwath, 41 Ariz. 417, 19 P.2d 82 (1933).
[8] The Court relied on a Washington case, Whiting v. Doughton, 31 Wash. 327, 71 Pac. 1026 (1903), and the Arizona case of Onekama Realty Co. v. Carothers, 59 Ariz. 416, 129 P.2d 918 (1942).
[9] 84 Ariz. 15, 22 P.2d 1078 (1958).

Safford on a "replacement new cost less depreciation" basis. In defense to an action brought by Safford to enforce the contract, defendant Co-op argued that the quoted phrase made the contract too vague and uncertain to be enforceable and that the court, in enforcing it, would be making an agreement for the parties. Defendant pointed out that there are many different methods of computing depreciation, such as the straight-line method and the percentage method, and that different results would be obtained depending on which of the methods was applied. The evidence indicated that the parties were unable to agree as to the method to be used.

The majority of the Supreme Court, in holding the contracts enforceable, stated that the fact there are many formulas for computing depreciation proves nothing unless it is shown that there is a material difference in results using the various methods, and that the defendant had not made the necessary showing.

The Court saw no reason for deviating from the dictionary definition of the word "depreciation," as a "falling of value . . . decline in value of an asset due to such causes as wear and tear, action of the elements, obsolescence, and inadequacy".[10] Several cases were cited in the opinion which had applied similar definitions of the term.[11] The dictionary meaning, it was said by the majority, should enable reasonable men to find "replacement new cost less depreciation".

Two of the justices vigorously dissented, saying that definitions are inadequate in that they cannot provide a formula by which it is possible to determine how the parties intended the price to be calculated. They quoted the methods described in 43 AM. JUR. 659, *Public Utilities and Services*, § 129:

> In general, there are two methods of estimating accrued depreciation of public utility property: (1) theoretical depreciation, based on the estimated life of the property; and (2) depreciation ascertained by observation and inspection. . . .

The dissenters were of the opinion that to use either one of these methods or a combination of both would be making an agreement for the parties and therefore the contract should not be enforced.

[10] WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1949).

[11] These cases are cited as authority merely for the definition of depreciation and contain no contract points: Addressograph-Multigraph Corp. v. United States, 78 F. Supp. 111, 112 (Ct. Cl. 1948), an income tax case; Downers Grove Community High School Dist. No. 99 v. Board of Education of Nonhigh School Dist. of DuPage County, 329 Ill. App. 208, 67 N.E. 2d 605 (1946), statute providing for tuition to school district; and Cumberland Tel. and Tel. v. City of Louisville, 187 F. 637 (1911), rate schedule interpretation.

Alternative Performance

In *Crouch v. Pixler*[12] the plaintiff was to drill an oil well on defendant's land. Plaintiff was to be paid by the foot, but if he encountered "rock in place" he was only to drill enough to confirm such fact. After drilling 495 feet plaintiff encountered what he thought was hard rock. He drilled 20 more feet and called in a mineralogist from the University of Arizona who confirmed this fact. Plaintiffs alleged full performance and the jury found full performance as a fact. Defendant, however, claimed that the above was only proof of part performance.

The Court held that where a contract calls for certain quantitative performance or a lesser performance if certain conditions occur, and these conditions do occur, the performance of this alternative is full performance.

Teacher Tenure

A.R.S. § 15-252 provides that if a teacher's contract is not to be renewed notice must be given by March 15. *School Dist. #6 of Pima County v. Barber*[13] held that this notice must be actually received by March 15, not merely mailed on March 15 as attempted by the defendant.

Consideration

Church v. Meredith[14] held that there was sufficient evidence in the lower court to sustain its finding that there was consideration for a promissory note.

[12] 83 Ariz. 310, 320 P.2d 943 (1958).
[13] 332 P.2d 496 (Ariz. 1958).
[14] 83 Ariz. 377, 321 P.2d 1035 (1958).

Corporations

WESTLYN C. RIGGS

A. Private Corporations

Ultra Vires Acts and Estoppel

In *Higgins v. Arizona Savings and Loan Association*[1] the plaintiffs applied for a loan from the defendant loan association to be secured by a mortgage on plaintiff's land. The defendant had notified plaintiffs that their application had been approved and later that the application had been rejected, as the land was not considered satisfactory to support the loan. The plaintiffs sued for breach of contract. Defendant contended that by statute[2] no loan could be made unless two appraisers had valued the land to be mortgaged and that only one appraiser had made an evaluation of plaintiff's land, and that since the provisions of the statute had not been complied with the contract to loan was ultra vires. The Court distinguished between corporate acts which were merely without authority and those which were illegal, and held that where an act was ultra vires because certain formalities were not complied with when entering into contracts within the scope of the corporation's charter, it could be estopped from alleging the failure to comply with the formalities as a defense. The Court felt that the statutory requirements were peculiarly within the knowledge of the officers of the association, and persons dealing with the association without notice of the nonperformance of the statutory formalities have the right to assume that they will be performed. Since the defendant represented to the plaintiffs that the application had been accepted and the plaintiffs changed their position in reliance on the representation, the doctrine of estoppel should be applied to meet the "ends of justice."

Liability for Fraud in Sale of Corporate Stocks

That any person who participated in or induced the unlawful sale of corporate stock is liable to the purchaser although such person has not received the consideration paid nor was a party to the sale, is illustrated by *Trump v. Badet*.[3] The plaintiff purchased stock in two corporations and thereafter participated in their management. The sales

[1] 85 Ariz. 6, 330 P.2d 504 (1958).
[2] A.R.S. § 6-410.
[3] 84 Ariz. 319, 327 P.2d 1001 (1958).

were induced by the defendants and the plaintiff sued to recover the purchase price alleging fraud on the part of the defendants. The Court in affirming the trial court's judgment for the plaintiff, held the following: (a) That while as a general rule no action of fraud lies against a person who was not a party to the sale nor received any of the consideration therefrom, the Arizona Securities Act[4] expressly provides that any person participating in or inducing the sale of securities is jointly and severally liable to the purchaser, (b) That the statutory exemption[5] of a sale in good faith by one other than the issuer or underwriter of the stock does not apply when there is a finding of fraudulent practices covered by the act,[6] and (c) That defendant's contention that no liability could be imposed as the stock was not required to be registered at the time it was issued by both plaintiff and defendants at the organization meeting of the corporation was without merit. This holding was based on the finding of fraudulent practices and the language of the statute[7] which granted exemption only to the original incorporators, and also the fact that the defendants had apparently admitted that plaintiff was not an incorporator.

Rights of Corporate Creditor

In *Creed v. State Equipment and Supply*[8] the plaintiff, a corporate creditor, sued a major shareholder in the corporation having mortgages on corporate property as security for loans made to it. The Court after finding that plaintiff's claim to the corporate property was prior to defendant's, held that an injured creditor, who had been wronged by acts which the corporation could not legally allow, may recover against a person converting corporate property.

B. Public Corporations

That the Corporation Commission cannot grant a certificate to a public motor carrier to operate except on public highways was reaffirmed in *Old Pueblo Transit co. v. Arizona Corporation Commission.*[9]

[4] A.R.S. § 44-2003.
[5] A.R.S. § 44-1844(3).
[7] A.R.S. § 1844(9).
[6] A.R.S. § 44-1991.
[8] 84 Ariz. 152, 325 P.2d 408 (1958). See also CREDITOR'S RIGHTS, *infra.*
[9] 84 Ariz. 389, 329 P.2d 1108 (1958).

Courts and Procedure

DICK RYKKEN and PHIL WEEKS

Judge's Right to Maintain Order

"What's going on here?" This apparently innocuous question triggered one of the more interesting series of events in Arizona law in 1958. The question was asked by the defndant in *State v. Van Bogart,*[1] an arson case, while the jury was being empaneled. In addition, the defendant made several other outbursts claiming that he was being "railroaded" and that he wanted to conduct his own case. Judge Hyder of the Maricopa County Superior Court warned him to control himself and finally threatened to gag him. With this, the defendant challenged the judge to go ahead with the result that the judge had him gagged until the jury was empaneled. Defendant's attorney continued the questioning of the proposed jurors while his client was gagged and then let the defendant conduct the rest of the defense.

The Supreme Court held that although it was error not to let the defendant question the jurors, it was not prejudicial in that nothing was shown by the defendant to the effect that any of the jurors was not qualified.

Another error cited by the defendant was also disallowed as the Court applied the old rule that a judge has the right and duty to maintain order in the court commensurate with the necessities of the case. *People v. Merkouris,*[2] a California case, is cited as authority. In that case, the threat of a gag was sufficient to maintain the desired order in the court. However, California authority is present to back the Arizona Court in *People v. Loomis*[3] in which the defendant was not only gagged, but strapped as well.

With this decision, the Arizona Supreme Court has applied an old rule with a new vigor.

Interrogatories

A less amusing, but more important decision was rendered on the controversial question of the use of interrogatories as provided in Rule 33, Arizona Rules of Civil Procedure, 16 A.R.S., to determine the exist-

[1] 331 P.2d 597 (Ariz. 1958). See also CRIMINAL LAW, *infra.*
[2] 46 Cal. 2d 540, 297 P.2d 999 (1956).
[3] 27 Cal. App. 2d 236, 80 P.2d 1012 (1938).

ence, amount, and nature of insurance of a defendant in an automobile injury case. In *Di Pietruntonio v. Superior Court,*[4] the Court ruled that such questions were not relevant to the trial and thus could not be determined by interrogatories. The Court said that insurance data was important only on the question of whether or not to settle the claim and did not affect the trial itself.

To arrive at this conclusion, the Court distinguished a number of cases throughout the country. *People ex rel Terry v. Fisher*[5] allowed the use of interrogatories to acquire this information. However, the Arizona Court distinguished that case because the Illinois Insurance Statutes require that all policies issued contain a clause stating that the injured party has a right to sue the insurance company if the defendant doesn't pay. This was said to imply that the insurance inures to the plaintiff and is thus a situation differing from Arizona's. California cases were distinguished on the same basis because a California statute specifically states that insurance inures to the benefit of the injured.

Federal courts are split on the issue with a New York district[6] and a Tennessee district[7] allowing the interrogatories and another Tennessee district[8] and a Pennsylvania district[9] disallowing them.

Arizona public policy, the Court said, has been stated in *Tom Reed Gold Mines Co. v .Morrison.*[10] In that case, the Court said that insurance was a personal matter in Arizona. In addition, the present Court quoted *Tom Reed* which says, "The fact that liability insurance was carried in no way affects the liability of the defendant and the injuries effect upon the jury is apparent." The present Court said that this Arizona law as given in the *Tom Reed* case is substantive in nature and should not be changed by a procedural interpretation differing from it. As the *Tom Reed* case arose on a voir dire examination of a juror, it is questionable whether this substantive Arizona law applies to a pre-trial examination.

A Kentucky case, *Maddox v. Grauman,*[11] mentioned in the Arizona case, provides one of the better discussions of this problem. In this case, pre-trial depositions asking insurance questions were allowed with the court stating that the question of relevancy is more loosely construed upon pre-trial examinations than at the trial. In addition, they state that the standard auto liability policy evidences a contract which inures to the benefit of every person who may be negligently injured by the assured as completely as if such injured person had been named in the

[4] 84 Ariz. 291, 327 P.2d 746 (1958).
[5] 12 Ill. 2d 231, 145 N.E. 2d 588 (1957).
[6] Orgel v. McCurdy, 8 F.R.D. 585 (1948).
[7] Brackett v. Wendall Food Products, 12 F.R.D. 4 (1951).
[8] McClure v. Boeger, 105 F. Supp. 612 (1952).
[9] McNelly v. Perry, 18 F.R.D. 360 (1955).
[10] 26 Ariz. 281, 224 Pac. 822 (1924).
[11] 265 S.W. 2d 939, 41 ALR.2d 964 (Ky. 1954).

policy. The court says that as it would be relevant to the subject matter if after the plaintiff prevailed, his judgment was unsatisfied, it should be equally so while the action is pending. The court goes on to state that the standard Kentucky law of refusing to allow insurance to be brought up at the trial is no way affected by their decision in this case.

The Arizona holding appears extremely controversial and may become even more so as the question of insurance becomes increasingly important by the enactment of Compulsory Liability Insurance laws throughout the country.

Notice

The case of *Wahl v. Hart*[12] involved the interpretation of A.R.S. § 11-705B, which requires notice of the proposed hearing to establish a county improvement district to be published in a newspaper of general circulation within the proposed district of improvement.

The question was whether the Arizona Weekly Gazette qualified as a newspaper of general circulation within such proposed district. The Arizona Weekly Gazette is the duly designated official newspaper of Maricopa County and, although it disseminates news on a variety of topics of interest to the general reader, it gives special prominence to legal news. It is delivered by mail only on subscription, and there were no subscribers within the proposed district. The Superior Court found that sufficient notice had not been given.

On appeal, the appellants unsuccessfully relied on *Burak v. Ditson*[13] which held that even though a newspaper was of particular interest to a particular class of persons, if it contained news of a general character and interest to the community, though limited in amount, it qualifies as a newspaper of general circulation. The Court said that similar publications have usually been held to be of general circulation, yet went on to say that the term "general circulation" is not wholly devoid of a quantitative connotation. "It implies a necessity for some circulation among those affected by the contents."

The actual holding of the case would seem to be limited to the newspaper not being one of general circulation *within the proposed district* as required by the applicable statute.

However, it might be inferred that Arizona will insist upon a greater circulation in the sense of number of people reached by the newspaper and less in the sense of substance, even when not dealing with a statute which insists upon circulation "within the proposed district". It would seem that the Court prefers a view which would insist upon a more

[12] 332 P.2d 195 (Ariz. 1958).
[13] 209 Ia. 926, 229 N.W.2d 227 (1930).

stringent requirement as to the size of the circulation than was required in the case cited by the appellants.

Service on an Attorney

An interesting interpretation of Rule 5(c), Arizona Rules of Civil Procedure, 16 A.R.S., and Rule 80(e) as to the service upon an attorney of record was given in *Schatt v. Stapley.*[14] In this case, notice to take defendant's deposition was served upon the defendant's attorney of record, who informed the server that he was no longer acting for the defendant, and defendant failed to appear. The plaintiff moved to strike defendant's answer and for a default judgment, notice of which was also served on the attorney of record, who once again told the server of his removal from the case. Default judgment was then granted for the plaintiff. The Supreme Court set aside the default judgment saying that service upon the attorney of record is insufficient when the server has knowledge that the attorney of record no longer actually represents the defendant and the plaintiff should have obtained permission from the court to serve the defendant personally.

Vacating Judgments

A construction of Rule 4(d)(1), Arizona Rules of Civil Procedure, 16 A.R.S., was given in *Lincoln-Mercury-Phoenix v. Base.*[15] The return of service stated that the server had left copies of the summons and complaint with a person over twenty-one at the place of abode of the defendant, and that the person who received the summons and complaint stated that she lived there. Upon the failure of the defendant to answer, a default judgment was rendered. The defendant filed a motion to vacate the judgment accompanied by an affidavit stating that at the time of the alleged service, defendant was out of the state, and that defendant had leased the premises to the person who received the service and that said person never told the defendant of the service. The affidavit was uncontroverted. On these facts, the Supreme Court affirmed the lower court's decision vacating the judgment.

In another action to set aside a default judgment, *Damiano v. Damiano,*[16] the contention of the appellant was that there was excusable neglect. In this case, the appellant was served by substituted service. The appellant failed to answer the complaint because he wrote the clerk of the court asking for the name and address of the plaintiff's attorney, which he received, and then wrote the attorney, but received no answer. Thus, he supposed that the action had been dropped. The Supreme

[14] 84 Ariz. 58, 323 P.2d 953 (1958).
[15] 84 Ariz. 9, 322 P.2d 891 (1958). See also CREDITORS RIGHTS, *infra.*
[16] 83 Ariz. 366, 321 P.2d 1027 (1958). See also DOMESTIC RELATIONS, *infra.*

Court affirmed the trial court's decision refusing to vacate the default judgment saying that this did not constitute excusable neglect.

In *Redman v. White*,[17] Redman executed a judgment against White which in turn was vacated by a court order procured by White. Thirty-three days after this order, Redman filed a motion to set aside the vacating order of the court, which was denied, and the plaintiff appealed. The Court held that improper procedure had been used by the plaintiff as a motion to set aside, made thirty-three days after the vacating order, was too late. Although not stated, presumably the Court was referring to Rule 59(d), Arizona Rules of Civil Procedure, 16 A.R.S., which requires a motion for a new trial to be filed within ten days.

Instructions

Rule 51, Arizona Rules of Civil Procedure, 16 A.R.S., was called into use in two cases citing as error instructions given in the trial court. In *Sult v. Bolenbach*,[18] the giving of instructions which neither party requested was cited as error. In *Romero v. Cooper*,[19] the cited error was the failure of the court to give instructions requested by the plaintiff. In both cases, the Supreme Court applied Rule 51 and held that the failure to make any objection in the trial court precluded any objection at the appellate level.

The absence of any mention of Rule 51 provided a more interesting Arizona case dealing with instructions. In *State v. Hudson*,[20] the defendant claimed he was drunk at the time of the murder for which he was tried. His attorney orally requested the judge to give the standard instruction on intoxication,[21] and the judge left the impression that he would comply as no objection was made by the state. However, this instruction was not given by the judge and both attorneys were given two opportunities to object to the instructions. On neither of these occasions did the counsel for the defendant make any objections. The failure to give the desired instruction was deemed reversible error by the Arizona Supreme Court with no mention made of the failure to object in the lower court.

Rule 272, Arizona Rules of Criminal Procedure, 17 A.R.S., provides that the civil rules will be applied as to instructions with certain exceptions. These exceptions include the right to make an oral request for instructions as differentiated from the written ones required in civil cases. However, there is no exception to provide that Rule 51, Arizona Rules of Civil Procedure, 16 A.R.S., should not apply.

[17] 331 P.2d 1096 (Ariz. 1958).
[18] 84 Ariz. 351, 327 P.2d 1023 (1958).
[19] 84 Ariz. 158, 325 P.2d 412 (1958).
[20] 331 P.2d 1092 (Ariz. 1958). See also CRIMINAL LAW, *infra*.
[21] A.R.S. § 13-132.

The case was submitted on briefs to the Supreme Court, but these briefs are of little help on this point, as the only mention of the failure to object appears in a fleeting comment in the State's brief which says that the defendant has probably waived his right to object, but that this may have been restored by his motion for a new trial.[22]

What precedent this case will provide for other criminal cases where no objection is made at the trial level is difficult to ascertain as the issue was not placed squarely before the court.

Criminal Procedure

In a matter of first impression, considered in *State v. Hill*,[23] the three-day time limitation for the motion for a new trial prescribed by Rule 308, Arizona Rules of Criminal Procedure, 17 A.R.S., was held to be jurisdictional, and the trial court's decision granting a new trial upon a motion of the defendant after this time limitation was reversed.

State v. Walker[24] held that an indictment which charged the defendant with robbery "on or about" a certain date was a sufficient allegation under Rule 118, Arizona Rules of Criminal Procedure, 17 A.R.S., which provides that an indictment or information need not contain an allegation of the time of the commission of the offense other than on or about such time.

In the same case, it was also held that the defendant, in order to be entitled to a new trial on the grounds of surprise, must have asked for a continuance or postponement during the trial, and the raising of the question on appeal for the first time was insufficient.

One of the assignments of error in the criminal case of *State v. Craft*[25] was that upon the defendant's motion requesting an examination of defendant with regard to his mental condition, the motion was granted, but no hearing nor ruling was had concerning the defendant's mental condition, and the case went to trial without such hearing. The Supreme Court held that this absence of hearing would have amounted to prejudicial error under Rule 250, Arizona Rules of Criminal Procedure, 17 A.R.S., if the hearing had been refused upon the request of the defendant, but since no request was made, nor was there an objection to the failure to have such a hearing, it did not amount to prejudicial error and the verdict was affirmed.

New Trials

In the cases of *Mayo v. Ephrom*[26] and *Blakely Oil v. Wells Truck-*

[22] Brief for appellee, p.12, Satte v. Hudson, citing Dugan v. State, 54 Ariz. 247, 94 P.2d 873 (1939).
[23] 85 Ariz. 49, 330 P.2d 1088 (1958).
[24] 83 Ariz. 350, 321 P.2d 1017 (1958). See also CRIMINAL LAW, *infra*.
[25] 333 P.2d 728 (Ariz. 1958). See also CRIMINAL LAW, *infra*.
[26] 84 Ariz. 169, 325 P.2d 814 (1958).

ways, Ltd.,[27] in which the lower court granted new trials, the Supreme Court reiterated the well-established rules that the granting of a new trial is within the sound discretion of the trial court. The Supreme Court also affirmed the trial court's decision in *Winterton v. Lannon*[28] on the ground that the evidence will be taken most strongly in favor of the trial court where there is any reasonable evidence to support it.

The Supreme Court held in *Singleton v. Valianos*[29] that a request for a directed verdict is not a prerequisite to an appeal from the denial of a motion for a new trial based upon the insufficiency of evidence to support the verdict.

Eight-hundred dollars in attorney's fees became the bone of contention in *Crouch v. Truman*.[30] Crouch was the defendant in a suit for damages which resulted in a judgment against him for $2,500 plus $800 in attorney's fees. Crouch appealed claiming that there was no evidence given regarding the fees, and they had been added by the judge after the verdict by the jury. The Supreme Court reversed the decision as far as the $800 was concerned. The plaintiff in the damage suit then sought a new trial below to add the attorney's fees. Crouch brought this action to the Supreme Court seeking a writ of prohibition preventing the judge from conducting the new trial. Along with this action came a memo from the judge certifying that the amount of attorney's fees was agreed upon at a private meeting between the two opposing attorneys with the judge present. As a result, he suggests that Rule 75(h), Arizona Rules of Civil Procedure, 16 A.R.S., be applied which allows the record to be changed to conform to what actually happened below.

The Arizona Court granted the writ of prohibition holding that whether a reversal without direction necessitates a new trial depends upon the intention of the appellate court and when the reversing error occurred after the verdict, no new trial should be had. The Court said that Rule 75(h), *supra*, didn't apply in that such an action should be taken prior to the time of decision on appeal and should be corrected by the trial court.

The basic reason behind the decision was that when a person has a full opportunity to develop his case and doesn't do so, the law does not call for a new trial to let him do what he should have done in the first trial.

Rule 59(a)(4), Arizona Rules of Civil Procedure, 16 A.R.S., the "newly discovered evidence" rule was discussed in *McGuire v. State of Arizona*,[31] which involved a paternity proceeding. After his conviction,

[27] 83 Ariz. 274, 320 P.2d 464 (1958).
[28] 85 Ariz. 21, 330 P.2d 987 (1958).
[29] 84 Ariz. 51, 323 P.2d 697 (1958).
[30] 84 Ariz. 360, 328 P.2d 614 (1958).
[31] 84 Ariz. 242, 326 P.2d 362 (1958). See also DOMESTIC RELATIONS, *infra*.

the defendant appealed on the ground that his attorney had just learned that he, the defendant, was sterile and claimed a new trial should be granted because of the "newly discovered" evidence. The Supreme Court pointed out that this rule did not apply in such a case, and besides, there had been evidence that the defendant had told the prosecutrix that he was sterile in the course of their activities.

Jurisdiction of the Courts

The petitioner in *Midway Enterprises Inc. v. Krucker*[32] made application to the zoning board of adjustment for territorial expansion of its business, and the board granted the application. This decision was reversed on appeal by the superior court, basing its reversal on an interpretation of the statute involved. The petitioner then, by writ of certiorari, contended that the superior court, by interpreting the statute, exceeded its jurisdiction. Petitioner relied on *State ex. rel. Morrison v. Thomas*,[33] which held that the trial court exceeded its jurisdiction when it misinterpreted a statute which prescribed a method for determining population in respect to the issuance of new liquor licenses. The Supreme Court denied the petition saying that on writ of certiorari the only question which it could consider was whether or not the superior court had jurisdiction, and, held that this case was distinguishable from *State v. Thomas* in that the misinterpretation of the statute in question in that case caused the court to exceed its jurisdiction because it was a statute dealing with the jurisdiction of the court, while here, the interpretation of the statute did not enlarge the court's jurisdiction, and therefore was not reversible by writ of certiorari.

A red light was given state courts regarding trying of Indians for traffic violations occurring in "Indian Country." *Matter of the Application of Ted Denetclaw, a Navajo Indian, for a Writ of Habeas Corpus*[34] held that under Title 18, U.S.C.A., § 1152, United States jurisdiction is exclusive over most criminal violations occurring in Indian Country. Indian Country includes by definition in Title 18, U.S.C.A., § 1151, "rights-of-way running through the reservation", *i.e.*, state highways.

In *Davies v. Russell*,[35] an action for writ of prohibition against the Superior Court of Coconino County, the petitioner, who had previously filed an action for separation from bed and board in Maricopa County, contended that the Coconino action for divorce filed by her husband should have been abated because of her previous action. The Court rejected this contention holding that the causes of action were not the same since they did not ask for the same relief, one of the requisites of

[32] 84 Ariz. 287, 327 P.2d 297 (1958).
[33] 80 Ariz. 327, 297 P.2d 624 (1956).
[34] 83 Ariz. 299, 320 P.2d 697 (1958).
[35] 84 Ariz. 144, 325 P.2d 402 (1958). See also DOMESTIC RELATIONS, *infra*.

making causes of action identical in order to work an abatement in a court of concurrent jurisdiction. The Supreme Court also held that the petitioner was erroneously allowed to file a supplemental complaint asking for divorce when the first action was for separation from bed and board. Further, under Rule 13(a), Arizona Rules of Civil Procedure, 16 A.R.S., the husband was not required to file a counterclaim for divorce to petitioner's action in Maricopa County, because at that time neither party would have met the jurisdictional requirements of residence in that county for six months.

It should be noted that some of the effect of this case has been negated by a recent amendment to A.R.S., § 25-311, which removes the requirement of residence in the county where the action is filed for six months next preceding the filing of the complaint for divorce, and now requires only that the petitioner be a resident of that county.

The question of ownership of a liquor license is not a question to be decided by the superintendent of liquor licenses or a Superior Court reviewing the superintendent's actions. *Kalastro v. Superior Court*[36] ruled that such a question should be decided in a separate action between the parties.

Change of Judge

The question of a change of judge for bias and prejudice was considered in two cases by the Supreme Court; *American Buyers Life Insurance Company v. Superior Court of Maricopa County*,[37] and *Hendrickson v. Superior Court*.[38] In the former it was held that under A.R.S., § 12-411, which provides for only one change of judge in any action, the voluntary disqualification of the judge upon the oral request of the litigant, without following the motion and affidavit prescribed by the statute, constituted the change of judge to which the litigant was entitled, even though the prescribed method was not followed. Consequently, the appellant was not entitled to another change of judge upon his motion and filing of affidavit in support thereof. In the latter case, *Hendrickson v. Superior Court*, the motion for change of judge and the affidavit in support thereof alleged that the disqualifying facts were unknown to the affiant until after the expiration of the time when the motion should have been made. The Superior Court judge denied the motion as a matter of law without a hearing, on the basis that it was not timely. The Supreme Court reversed the decision and held that when the motion for change of judge for bias and prejudice is based on disqualifying facts of which the petitioner has subsequently acquired knowl-

[36] 83 Ariz. 316, 320 P.2d 946 (1958).
[37] 84 Ariz. 377, 329 P.2d 1100 (1958).
[38] 85 Ariz. 10, 330 P.2d 507 (1958). See also DISQUALIFICATION OF JUDGE FOR BIAS AND PREJUDICE, *infra*.

edge, the motion is timely provided it is shown that such facts are true and that the petitioner had subsequently acquired knowledge of them. Therefore, the petitioner was entitled to a hearing to ascertain the truth of the affidavit supporting his motion.

Pleading

The pleadings in *Mullen v. Gross*[39] admitted that the water rights involved in this case were not percolating waters but the trial court found them to be such. The judgment was reversed on the ground that it is not within the court's province to raise issues and that findings against the allegations admitted by the pleadings are outside the issues and thus erroneous.

The Supreme Court in *Dixon v. Feffer*[40] affirmed the trial court's action under Rule 15(b), Arizona Rules of Civil Procedure, 16 A.R.S. The first two counts of plaintiff's complaint were on express contracts for materials furnished for a building for defendant, and the defendant's answer denied such contracts and set forth an express contract for construction of a building and counterclaimed for the breach thereof. At the conclusion of the trial, the plaintiff was allowed to amend his complaint to set forth an express contract for construction of the building. The Supreme Court held that the trial court was correct in permitting the plaintiff to so amend under Rule 15(b), "Amendment to Conform to the Evidence".

Rule 15(b), *supra*, was also used as a basis for the Court's affirmance in *Baxter v. Harrison*.[41] The answer of the defendant merely alleged the failure of the complaint to state a cause of action. After the deposition of the plaintiff was taken, and shortly before trial, the defendant moved for a summary judgment supported by an affidavit showing the plaintiff's lack of capacity to sue, which the court granted. The plaintiff contended that such motion was improper because of Rule 9(a), Arizona Rules of Civil Procedure, 16 A.R.S., which says that the issue of the lack of plaintiff's capacity to sue must be raised by a specific negative averment. However, the Supreme Court said that the treating of the affidavit of the defendant as an amendment to his pleading under Rule 15(b), *supra*, was proper and affirmed the summary judgment rendered in the trial court.

Miscellaneous

The Court pointed out in *Carp v. Superior Court of Maricopa County*[42] that a stay of execution is not an automatic feature of an ap-

[39] 84 Ariz. 207, 326 P.2d 33 (1958).
[40] 84 Ariz. 308, 327 P.2d 994 (1958).
[41] 83 Ariz. 354, 321 P.2d 1019 (1958).
[42] 84 Ariz. 161, 325 P.2d 413 (1958).

peal. In this case, the plaintiffs brought action against the State Board of Dispensing Opticians to compel them to issue licenses to practice to the plaintiffs. The plaintiffs secured a writ of mandamus against the Board and the Board appealed. Plaintiffs sought to have the writ enforced and the trial court said that it didn't have jurisdiction pending the appeal. Plaintiffs then brought this action to compel the lower court to enforce the writ of mandamus and the Supreme Court held that a stay of execution must be procured by a party making an appeal, and, in the absence of this, the court may enforce the judgment previously ordered. This is no departure from the law as it is followed throughout the country.

In *Hale v. Brown*,[43] the plaintiff assigned as error the granting of a summary judgment for the defendant at a hearing which was held less than ten days after the defendant's motion for summary judgment under Rule 56, Arizona Rules of Civil Procedure, 16 A.R.S. The plaintiff had made no objection to this time in the trial court. The Court held that since the time limitation of Rule 56(c), Arizona Rules of Civil Procedure, 16 A.R.S., was not jurisdictional, the failure to make an objection constituted a waiver. The Court also held that not only the pleadings, but also the facts shown on the record when the motion is made should be considered in the hearing on the summary judgment, and if there is any disputed material fact, the motion should be denied.

The question of the right of intervention was brought up in *Mitchell v. City of Nogales*.[44] Here, under a local ordinance, the plaintiff had the city attorney institute an action to enjoin the payment of money by the city under a contract. At the hearing the appellant sought to intervene but was denied intervention on the ground that his complaint presented issues identical to the city attorney's complaint. In construing Rule 24(b), Arizona Rules of Civil Procedure, 16 A.R.S., "Permissive Intervention", the Supreme Court affirmed the dismissal, holding that the appellant was adequately represented and did not have a right to intervene.

Stover v. Desmar[45] repeated the well-known rule that failure to file an answering brief to the Supreme Court constitutes a confession for the appellee.

Prince Development Corporation v. Beal[46] held that the owners of property could not be liable for contempt for maintaining a nuisance in violation of a court order when the property was in the hands of a receiver at the time of the alleged violation.

[43] 84 Ariz. 61, 323 P.2d 955 (1958).
[44] 83 Ariz. 328, 320 P.2d 955 (1958).
[45] 84 Ariz. 387, 329 P.2d 1107 (1958).
[46] 331 P.2d 1091 (Ariz. 1958).

Creditor's Rights

CLIFFORD G. BLEICH

Rights of Corporate Creditor

In *Creed v. State Equipment and Supply*,[1] the defendant was general manager, chairman of the board, and majority stockholder of a corporation. At a time when this corporation was indebted to both the plaintiff and the defendant, the claims of the plaintiff being prior to those of the defendant, the board of directors passed a resolution which authorized its officers to issue a bill of sale for all of the corporate property to the defendant, and to turn over all of the corporate assets to him in payment of his debt. This was done, which allegedly resulted in the eradication of the plaintiff's rights as a prior creditor. This action was brought for the conversion of the corporate property.

In holding as a matter of law that the defendant had converted the property of the corporation and noting that the bill of sale was void, the Court said that the corporation had no right to allow such acts and that a creditor who has been injured by such a preference has a right to recover against the party converting the corporate property.

Execution and Judgment

Substituted service failed to result in actual notice to the defendant in *Lincoln-Mercury-Phoenix, Inc. v. Base*.[2] A judgment by default was rendered against defendant upon her failing to appear, and her real property was then executed on, pursuant to the judgment, and sold at a sheriff's sale to the plaintiff.

The Supreme Court of Arizona, relying on a prior decision, held that when there is no notice and opportunity to be heard, so as to violate due process, the court lacks jurisdiction, and any judgment rendered thereunder is void.

The Court went on to say that any writ of execution that is rendered under a void judgment is also void, and that a subsequent execution sale does not pass any title to a purchaser.

[1] 84 Ariz. 152, 325 P.2d 408 (1958). See also CORPORATIONS, *supra*.
[2] 84 Ariz. 9, 322 P.2d 891 (1958). See also COURTS AND PROCEDURE, *supra*.

Homestead Exemption

The often debated question of the effect of divorce upon a pre-existing declaration of homestead was answered in *Phlegar v. Elmer*.[3] In this case, the family consisted solely of the husband and wife. The wife, the defendant in this action, recorded a declaration of homestead upon the property, and upon divorce was awarded the realty in question. After the divorce the plaintiff obtained a judgment against the defendant and her former husband and executed upon this realty which was subsequently purchased by the plaintiff at the execution sale. The plaintiff then brought this action to quiet title.

The defendant argued that A.R.S. § 33-1104 lists the only methods by which a homestead might be dissolved. The Court, in rendering judgment for the plaintiff, held that there could be no homestead exemption unless there was a family and said that A.R.S. § 33-1101 and A.R.S. § 33-1104 must be read together. The Court held that the dissolution of the family took away the right to have a homestead and without the family the homestead was dissolved.

Prior to this case, the question "What effect does divorce have upon the homestead declaration when the family for whose benefit the homestead was filed consists of only the husband and wife?", had been unanswered in Arizona. There is authority for the proposition that a divorce, regardless of the fact that the family consists solely of the husband and wife, has no effect upon a pre-existing homestead. However, the majority of jurisdictions appear to follow the rule applied by the Arizona Supreme Court in the principal case.[4]

Fraudulent Conveyances and Garnishment

In *Linder v. Lewis, Roca, Scoville and Beauchamp*[5] one Marches procured a judgment against Tolmachoff and made an assignment thereof to the garnishee. He also made an assignment of the judgment to Thomas, subject to the prior assignment to the garnishee. The trial court found that both of these assignments were made with the mutual intent of hindering the creditors of Marches, the assignor, and therefore were fraudulent conveyances under A.R.S. § 44-1007. After the garnishee had collected on this judgment from Tolmachoff, he was served with a writ of garnishment by a judgment creditor of Marches. Thereafter, the garnishee paid to Thomas the fund that he had collected from Tolmachoff and filed an answer to the writ in which he claimed to be an assignee of Marches and denied having any property of Marches in his possession.

[3] 84 Ariz. 204, 325 P.2d 881 (1958). See also DOMESTIC RELATIONS, *infra*.
[4] 97 A.L.R. 1095; 40 C.J.S. *Homesteads* § 160; 26 AM. JUR. *Homesteads* §§ 205, 206.
[5] 333 P.2d 286 (Ariz. 1958). See also ATTORNEY AND CLIENT, *supra*.

The Supreme Court said that there was ample evidence to support the conclusion that this conveyance was fraudulent, so that the fund collected on the judgment by the garnishee was subject to the writ of garnishment. The garnishee argued that he had, by paying the fund to Thomas, recognized that assignment as valid rather than the assignment to himself. The Court held that since this, too, was a fraudulent conveyance within the meaning of A.R.S. § 44-1007, the argument of the garnishee was without weight. The judgment of the lower court in favor of the garnishor was therefore affirmed.

Criminal Law

EDWARD I. KENNEDY

Habeas Corpus

Affirming the trial court in quashing appellant's petition for a writ of habeas corpus, the Court in *Vigileos v. State*[1] held the fact that the appellant was confined as a prisoner in the same section of the State Prison as adult prisoners while appellant was under eighteen years of age, was not a ground for writ of habeas corpus.

The Court also held that although appellant did not receive a preliminary hearing on the burglary charge of which he was convicted and did not waive such hearing, his failure to object before pleading on the merits as provided by Arizona Rules of Criminal Procedure[2] precluded him from raising this issue in the habeas corpus proceedings.

Discretionary Powers

In *State v. Van Bogart*[3] the trial court dramatically demonstrated its right to maintain order and preserve its dignity and legal decorum. The trial judge in ordering a recalcitrant defendant gagged when he persisted in disrupting the court was held not to have committed prejudicial error and thus did not deprive him of a fair trial.

Possession and Sale of Narcotics

In affirming a conviction for the sale and possession of narcotics the Court in *State v. Milton*[4] reiterated the maxim that testimony of a witness on cross-examination is no stronger than as modified by his direct and redirect examination. Consequently, a portion of his testimony may not be singled out to the exclusion of equally important testimony given by the witness, as a foundation for reversal.

Voluntary Intoxication

The participation in the consumption of two and three-fourths gallons of wine by the defendant on the day of the homicide was held

[1] 84 Ariz. 404, 330 P.2d 116 (1958).
[2] Arizona Rules of Criminal Procedure, 17 A.R.S.
[3] 331 P.2d 597 (Ariz. 1958). See aso COURTS AND PROCEDURE, *supra.*
[4] 331 P.2d 846 (Ariz. 1958).

to be sufficient evidence of intoxication to warrant an instruction on the effect of voluntary drunkenness in relation to malice aforethought as a necessary element of murder in the second degree. Failure to give such an instruction constituted reversible error in *State v. Hudson*.[5] In reaching this conclusion the Court applied A.R.S. § 13-132 and stated as a general rule voluntary drunkenness at the time a crime is committed is no defense. However, it is to be considered by the jury in determining the presence or absence of the necessary state of mind to constitute malice aforethought, which distinguishes murder from manslaughter.

Probation

In *Peterson v. Honorable Al J. Flood, Justice of the Peace*,[6] the Court construed A.R.S. § 13-1657 as a legislative grant to justice courts of the power to suspend the imposition of sentence and place defendants on probation.

Bogus Checks

In *State v. Wilson*,[7] the defendant, charged with attempting to obtain money or property by means of a bogus check,[8] elected to proceed with the trial following refusal to grant an instructed verdict. The Court stated that when the defendant does not stand upon his motion but elects to go forward with the proof, he runs the risk of supplying the deficiency upon which his motion is based. The Court then held that the defendant in proceeding with such proof provided ample evidence of his fraudulent intent in the form of a false phone number, wrong signature and admission that the account was closed. In addition the defendant contended the check in question was a company check. Consequently defendant's failure to provide a counter signature on the check constituted additional evidence of his fraudulent intent.

Circumstantial Evidence

In *State v. Andrade and Chavez*,[9] the Court reversed a burglary conviction with instructions to dismiss the information against the appellants. Citing *State v. Butler*,[10] the Court said, "to warrant a conviction on circumstantial evidence alone, the evidence must be consistent with guilt and inconsistent with every reasonable hypothesis of innocence." Mere presence of the defendants in an automobile in which items taken

[5] 331 P.2d 1092 (Ariz. 1958). See also COURTS AND PROCEDURE, *supra*.
[6] 84 Ariz. 256, 326 P.2d 845 (1958).
[7] 84 Ariz. 165, 325 P.2d 416 (1958).
[8] A.R.S. § 13-311.
[9] 83 Ariz. 356, 321 P.2d 1021 (1958).
[10] 82 Ariz. 25, 307 P.2d 916 (1957).

in a burglary were found established neither knowledge of the stolen items by the defendants, nor possession of the articles by the defendants.

Criminal Procedure

Urrea v. Superior Court[11] states that dismissal of a prosecution under Rule 236, Ariz. Rules of Criminal Procedure, 17 A.R.S. (failure to file a motion or bring to trial within sixty days) results in a grant of immunity by law from further prosecution for the same offense, unless the court at the time of the dismissal ordered a new prosecution to be instituted.[12]

Alibi

In *State v. Walker*[13] the Court recognized a conflict between the presumption that a defendant must know when the alleged crime was committed if he is to avail himself of the defense of alibi, and the statutory provision for faulty memory or inaccuracy of the date of occurrence. Citing Rule 118, Ariz. Rules of Criminal Procedure, 17 A.R.S., which provides that unless the time of commission of the crime is necessary under Rule 115, Ariz. Rules of Criminal Procedure, 17 A.R.S., an allegation in the information of "on or about such time", is sufficient. The Court then cited 23 C.J.S. *Criminal Law*, § 1431 at 1133, to the effect that a party will not be allowed to sit back and speculate on the result of the verdict and when decided against him claim the right to a new trial on the ground of surprise. To preserve the point he must ask for a continuance or a postponement at the time of the surprise.

Instructions

In affirming a conviction of murder in the first degree and the extreme penalty of death, the Court in *State v. Craft*[14] reviewed controversial instructions given to the jury at eleven a.m. on the day following its retirement to deliberate. The instructions were given without request by the jury to the effect that the jury should not be unreasonable or arbitrary and to honestly approach the problem with a view to arriving at a verdict if possible, without surrendering their conscientious convictions. The Court held the instruction not to be erroneous. Chief Justice Udall and Justice Struckmeyer rendered a separate concurring opinion cautioning that the use of such instructions by the trial courts should be rare, and as members of the Court, they would continue to

[11] 83 Ariz. 297, 320 P.2d 696 (1958).
[12] Rule 238, Arizona Rules of Criminal Procedure, 17 A.R.S.
[13] 83 Ariz. 350, 321 P.2d 1017 (1958). See also COURTS AND PROCEDURE, *supra*.
[14] 333 P.2d 728 (Ariz. 1958). See also COURTS AND PROCEDURE, *supra*.

carefully scrutinize the circumstances surrounding the giving of such instructions.

Double Jeopardy

In *Appication of Williams*,[15] a petition for a writ of habeas corpus, the state presented its case in chief in a prosecution of second degree murder. It then moved for and was granted a dismissal with instructions to file a new complaint in justice court on the grounds that the evidence presented at the trial showed an offense of a higher nature had been committed.[16] The Court, in upholding the constitutionality of A.R.S. § 13-1595 as a general proposition, pointed out a second trial would place the defendant in double jeopardy when, "the elements necessary to sustain a conviction for murder of the second degree are implicit in the evidence necessary to sustain a conviction of murder of the first degree." The trial court's ruling denying the defendant's application for a writ of habeas corpus was reversed with instructions to discharge the defendant.

Corpus Delecti

In *State v. Hernandez*[17] the defendant was convicted of having been an accessory to a kidnapping in that he had knowledge of the kidnapping or had harbored and protected the kidnapper.[18] Part of the evidence admitted by the trial court was a statement given by the defendant. The defendant appealed his conviction on the ground that the corpus delecti had not been sufficiently established prior to and independently of the defendant's statement. The Court reversed the trial court with directions to dismiss the information and in doing so clarified a basic principle of criminal law, paraphrased as follows: The degree of proof of corpus delecti required as a condition precedent to the admission of a defendant's confession or statement is adequate if it is sufficient to warrant a reasonable inference that the crime charged was actually committed by some person. To the extent that *State v. Burrows*,[19] or *State v. Thorp*,[20] required the independent proof to be clear and convincing, they were disapproved.

Admissibility of Statements

In *State v. Jordan*,[21] the Court, in an interpretation of A.R.S. §

[15] 333 P.2d 280 (Ariz. 1958). See also CONSTITUTIONAL LAW, *supra*.
[16] A.R.S. § 13-1595.
[17] 83 Ariz. 279, 320 P.2d 467 (1958).
[18] A.R.S. § 13-141.
[19] 38 Ariz. 99, 297 Pac. 1029 (1931).
[20] 70 Ariz. 80, 216 P.2d 415 (1950).
[21] 83 Ariz. 248, 320 P.2d 446 (1958).

13-1418, adopted from the Federal Rules of Criminal Procedure,[22] repudiated the Federal McNabb doctrine. The Court held, "unnecessary delay in arraigning a prisoner before a judicial officer did not ipso facto make inadmissible statements made by the defendant during the period he was detained." Rather, the test of admissibility is whether such statements were given voluntarily. To justify the exclusion of such statements, coercion or involuntariness must be demonstrated. The delay itself will be considered as a possible coercive factor.

Cruelty to Animals

In *State v. Stockton*,[23] the defendant was charged with cruelty to animals in violation of A.R.S. § 13-951. The trial court granted defendant's motion to quash the information. The State of Arizona then appealed since the trial court had failed to designate the grounds upon which it relied in quashing the information. The Court, in reviewing A.R.S. § 13-951 (Cruelty to Animals), upheld the trial court and in so doing refused to extend the scope of the statute in question to include gamecocks as animals. The Court cited *State v. Menderson*,[24] and *State v. Tsutomu Ikeda*,[25] saying:

> What a statute commands or prohibits in the creation of new crimes should be very definite and easily understood by the common man.

And that:

> Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts . . . to avoid.

[22] Rule 5(a), Federal Rules of Criminal Procedure, 18 U.S.C.
[23] 333 P.2d 735 (Ariz. 1958).
[24] 57 Ariz. 103, 111 P.2d 622, 624 (1941).
[25] 61 Ariz. 41, 143 P.2d 880 (1943).

Domestic Relations

ROBERT N. AXELROD

Homestead

In *Phlegar v. Elmer*,[1] the Court took notice of two statutes, A.R.S. § 33-1101 and A.R.S. § 33-1104. The former provides that every head of a family,[2] under certain conditions, may hold real property as a homestead, while the latter recognizes the methods by which a homestead may be abandoned. The Court stated that it is necessary in order to accomplish the purpose of the act to construe these two sections together. Applying this principle, it was declared that the homestead right does not continue after the dissolution of the family caused by a divorce decree. The family before divorce consisted only of the husband and wife. The defendant based her claim that she was nevertheless entitled to the benefit of the homestead exemption upon the abandonment provision of the latter statute. However, the Court recognized that this statute necessarily assumes the existence of a valid homestead right. Therefore, there being no such right because of the dissolution of the family, abandonment is not legally possible.

Community Property

It is well-settled in the State of Arizona that property acquires its status at the time of its acquisition. In *Craver v. Craver*,[3] the proceeds of a sale of decedent's separate property were held to be his separate property. The burden is upon him who claims the proceeds to be community property to prove such by clear and convincing evidence. A sale, which transmutes realty to personalty, does not in itself change the proceeds thereof to community property.

Paternity

McGuire v. State[4] involved a paternity proceeding. The action was brought under what is presently A.R.S. § 12-841 through 12-851. The

[1] 84 Ariz. 204, 325 P.2d 881 (1958). See also CREDITOR'S RIGHTS, *supra*.
[2] Lobban v. Vander Vries Realty & Mortgage Co., 48 Ariz. 180, 60 P.2d 933 (1936), as to what constitutes a family.
[3] 85 Ariz. 17, 330 P. 2d 731 (1958).
[4] 84 Ariz. 242, 326 P.2d 362 (1958). See also COURTS AND PROCEDURE, *supra*.

Court made specific reference to a particular section,[5] in which it is expressed that the function of the jury is limited to finding the defendant either guilty or not guilty, and that the amout to be paid by the defendant for lying-in and maintenance of the child is to be determined exclusively by the trial judge. Citing an earlier Arizona decision,[6] the Court observed that normally the testimony of the child's mother need not be corroborated as to paternity. The Supreme Court held that there was no error in an instruction to the jury, which stated in substance that the defendant could be found to be the father of the unborn child on the sole testimony of the mother, provided such testimony was credible.

Divorce

A statute which provides for the vacating of a judgment for excusable neglect may be applied to a judgment rendered in a divorce proceeding.[7] In *Damiano v. Damiano*,[8] such application was unsuccessful. The trial court found that there was no excusable neglect, the significant fact being that there was a period of 103 days between the service of summons and complaint on the defendant and the rendition of judgment, without the defendant filing an answer or otherwise making an appearance. The question whether a default divorce decree may be set aside on the ground of excusable neglect lies within the sound discretion of the trial court, unless it is shown that there is excusable neglect as a matter of law. The Supreme Court decided that there was no abuse of discretion in the instant case.[9]

Application of A.R.S. § 25-317 was necessary in *Hemphill v. Hemphill*.[10] All material allegations, including residential requirements, must be corroborated in order to sustain a judgment of divorce.[11] The requirement for corroboration under this statute was not met and therefore a divorce should not have been granted. The wife's admission in a sworn reply to a counterclaim, as to the residency of her husband, conflicted with her testimony as to her husband's whereabouts immediately prior to the trial. The importance of and necessity for this statute was indicated as being a preventative measure against obtaining a divorce by collusion or connivance.

A divorce decree, with a provision that the husband pay to his wife a specified sum of money each month for a period of six months *only*, was held not to be subject to modification in *Cummings v. Lockwood*.[12]

[5] A.R.S. § 12-845, subdivisions A and B.
[6] Rightmire v. Sweat, 83 Ariz. 2, 315 P.2d 659 (1957).
[7] Rule 60(c), Rules of Civil Procedure, 16 A.R.S.
[8] 83 Ariz. 366, 321 P.2d 1027 (1958).
[9] This case is also noted in COURTS AND PROCEDURE, *supra*.
[10] 84 Ariz. 95, 324 P.2d 225 (1958).
[11] In re Sweeney, 51 Ariz. 9, 73 P.2d 1349 (1937).
[12] 84 Ariz. 335, 327 P.2d 1012 (1958).

A.R.S. § 25-321, providing that the court may amend, revise, and alter alimony payments on petition of either party, and A.R.S. § 25-319, with a provision that the amount may be paid in one sum or in installments, should be construed together. Such construction requires that the former statute impliedly excepts from its operation an alimony award payable in a lump sum or an award in one sum payable in installments. To do otherwise would be to give no effect to A.R.S. § 25-319 where it is expressly provided that alimony may be in one sum.

Whether there was an abatement of a divorce action by reason of the pendency of a prior action for separation from bed and board was the issue presented in *Davies v. Russell*.[13] In deciding against the contention that there was such an abatement, the Court carefully noted that the two causes of action differed, in that the same relief is not demanded in both actions. This is evidenced by the fact that a decree of divorce terminates forever the marriage relationship, except by remarriage, whereas the parties, after a decree of separation from bed and board, may restore their marital status by having the decree vacated. Also, at the time of the decision of this case, there was a statutory requirement that in an action for absolute divorce the plaintiff must be a resident of the state for one year and of the county for six months immediately preceding the filing of the complaint. The county jurisdictional requirement affected greatly the decision of this case. This provision has since been superseded.[14]

In *White v. White*[15] the plaintiff commenced a quasi-in-rem action for separate maintenance in the Superior Court of Arizona against her husband, a domiciliary of Colorado. Service was had by registered mail. Twenty days later her husband was granted an *ex parte* divorce in Colorado. The divorce decree was silent as to any provision for support of plaintiff or the children. The trial court dismissed plaintiff's action on the ground the divorce decree extinguished her rights and was entitled to full faith and credit. This was reversed on appeal,[16] the Court holding the full faith and credit clause inapplicable since the Colorado decree was interlocutory and had not yet become final.

On retrial, the divorce having become final in the interim, the trial court again dismissed, relying on the full faith and credit clause. On this appeal the Court was faced with the question of whether a foreign divorce decree, where there was no personal jurisdiction over the wife, extinguished her right to support.

A court has no jurisdiction to adjudicate a personal claim unless

[13] 84 Ariz. 144, 325 P.2d 402 (1958). This case is also noted in COURTS AND PROCEDURE, *supra*.
[14] A.R.S. § 25-311. As amended Laws 1958, ¶ 38, § 2.
[15] 83 Ariz. 305, 320 P.2d 702 (1958).
[16] White v. White, 78 Ariz. 397, 281 P.2d 111 (1955).

it has in personam jurisdiction over the parties. Any attempt to do so would run afoul of the due process clause of the United States Constitution.[17] Accordingly, in *Vanderbilt v. Vanderbilt*,[18] the United States Supreme Court upheld an alimony award by a New York court rendered ten months after a valid Nevada divorce. In adopting the reasoning of these cases, the Arizona Supreme Court held that an *ex parte* divorce is entitled to full faith and credit only insofar as it terminates the marital status of the parties, and that it does not, by force of the full faith and credit clause, deprive the absent spouse of her personal right of support.

Although in the instant case the foreign divorce decree did not purport to extinguish the wife's right to alimony or separate maintenance, it is clear from the rationale of the decision, as well as those discussed above, that such a provision in a foreign judgment would be void under the due process clause where there was no jurisdiction over the wife.

Recognizing the problems created by *ex parte* divorces, the majority of states permit the wife to obtain alimony after a final *ex parte* divorce obtained by the husband.[19] A substantial minority allow recovery even where the wife has procured the *ex parte* divorce and later seeks alimony.[20] The Arizona statutes, however, have no such provision.[21] The Court in the instant case recognized that Arizona's statute regarding separate maintenance[22] contemplates a valid marriage relationship *at the time such action is instituted*, but since plaintiff filed her complaint before the divorce became final, the action came within the statute.

[17] Estin v. Estin, 334 U.S. 541 (1948).
[18] 354 U.S. 416 (1957).
[19] *E.g.*, Davis v. Davis, 197 Pac. 241 (Colo. 1921); Searles v. Searles, 168 N.W. 135 (Mich. 1918).
[20] Illinois, Massachusetts, and Utah permit it by statute. Karcher v. Karcher, 204 Ill. App. 210 (1917); Parker v. Parker, 97 N.E. 988 (Mass. 1912); Hutton v. Dodge, 198 Pac. 165 (Utah 1951).
[21] See A.R.S. §§ 25-319, 25-321.
[22] A.R.S. § 25-341.

Elections

PHILIP TOCI

Nomination by Other Than Primary Election

In *Cavender v. Board of Supervisors of Pima County,*[1] the plaintiffs, one a defeated candidate in the primary election and the other a non-participant, sought to have their names placed on the ballot for the general election. Both of the plaintiffs were registered Democrats and qualified electors of Pima County. The plaintiff's certificates of nomination were filed pursuant to A.R.S. § 16-601 which states, in effect, that candidates for public office may be nominated otherwise than by primary election by filing a certificate of nomination within ten days after the primary election and choosing a designation under which the candidate shall be placed on the ballot. The plaintiffs selected "Clean Government" as their designation. A writ of mandamus was applied for to compel the board of supervisors to accept the certificates of nomination and the writ issued, but was quashed by the lower court. In reversing the trial court it was said that the official registration of the plaintiffs as Democrats had nothing to do with their right to procure nomination "other than by primary election" under the provisions of A.R.S. § 16-601. The Supreme Court stated that plaintiffs choice of "Clean Government" as a designation did not make them members of a newly created party so as to preclude them from being placed on the ballot because they were not registered as such.

A similar situation was involved in *Board of Supervisors of Pima County v. Harrington.*[2] However, in this case the plaintiffs chose "Republican" as the designation under which they wished their names to appear on the ballot and in the primary election the Republican Party had failed to nominate candidates to the offices plaintiffs were seeking. The lower court refused to allow the names to be placed on the ballot and the Supreme Court affirmed, saying that although A.R.S. § 16-601 gives the right to a person seeking public office to have his name printed upon a ballot to be used at the general election, this is subject to the provisions of A.R.S. § 16-503 which states, "If no candidate is nominated

[1] 333 P.2d 967 (Ariz. 1958).
[2] 333 P.2d 971 (Ariz. 1958).

in the primary election for a particular office, then no candidate for that office for that party may appear on the general or special election ballot." Because the plaintiffs used the designation "Republican" and no candidate was selected by the Republican Party at the primary election for the offices sought by the plaintiffs they were not entitled to have their names appear on the ballot at the general election.

Preventing Candidates From Being Listed on Ballot

A writ of mandamus was sought in *Smoker v. Bolin*,[3] to compel the Secretary of State to take *no action* which would cause the name of a candidate to be listed on the ballot at the primary election. There were two vacancies on the Corporation Commission to be filled at the primary election; a two year period to finish the term of a deceased member and a regular term. The regular term was held by Brooks who had filed nomination petitions to succeed himself. The plaintiff challenged the legality of these petitions on the ground that Brooks did not specify in his nomination petitions which of the two terms he was seeking. It was held that a writ of mandamus would only issue to compel the performance of an act and would not be applied to restrain a public official from doing an act.

Filling of Unexpired Term by Election

Whether an unexpired term of a deceased member of the Corporation Commission could be filled by election was the question which arose in *Bolin v. Superior Court of Maricopa County*.[4] A member of the commission had died and his vacancy had been filled by Senner. Senner and others then filed nomination petitions to have their names placed on the primary election ballot to fill the unexpired term of the deceased. An injunction was granted by the lower court prohibiting the Secretary of State from certifying that there was an office to be filled by the electors for the unexpired term of the deceased. The Secretary of State applied for a writ of prohibition against the trial court to restrain the enforcing of this injunction. The Supreme Court issued an alternative writ and made it peremptory. The elections were held and Senner was elected. The Court stated that under the Arizona Constitution, Art. 15, § 1, A.R.S., the Governor has the authority to appoint a commissioner to fill the vacancy until a commissioner shall be elected at a general election. The point in issue here was whether "general election" means the general election at which the corporation commissioner would be elected in the usual course of events at the expiration of the full term of office

[3] 333 P.2d 977 (Ariz. 1958). See also ADMINISTRATIVE LAW, *supra*.
[4] 333 P.2d 295 (Ariz. 1958).

or whether it refers to the next general election closest in point of time after the vacancy occurs. It was decided that the latter construction was the proper one, the Court saying, ". . . the vacancy in the office of the Corporation Commission such as existed here must be filled at the next general election closest in point of time after the vacancy occurs."

State Elector Contesting The Nomination of U. S. Congressman

In *Harless v. Lockwood*,[5] it was questioned whether a candidate for the office of Representative to Congress came within A.R.S. § 16-1201, which provides that any elector of the state may contest the election of any person declared nominated to a *state office* at a primary election. Harless and Haldiman were rival candidates for the Democratic nomination for Representative to Congress and Haldiman was nominated. Harless filed a statement of contest in the Superior Court, and the court refused to take jurisdiction. Original proceedings in mandamus were brought to compel the court to take jurisdiction over the contest. Mandamus was allowed and it was said that the use of "state office" in A.R.S. § 16-1201 could be properly interpreted to include nominees for Representatives to the Congress of the United States.

Candidacy of Incumbent Superior Court Judge for Supreme Court

In *Whitney v. Bolin*,[6] the issue was raised as to whether the office of Judge of the Superior Court was vacated by the holder of that office filing nomination papers qualifying him as a candidate for a seat on the Arizona Supreme Court. An original petition in mandamus was brought to compel the Secretary of State to designate the office of Judge of the Superior Court vacated. The Supreme Court refused to issue the writ of mandamus in spite of the language of A.R.S. § 38-296 which says that no incumbent of an elective office shall be eligible for nomination or election to any other office than the one held. It was felt that this statute was in conflict with the express language of the Arizona Constitution, Art. 6, § 11, which allows judges of the Superior Court and Supreme Court to seek other judicial offices. The conflict was resolved in favor of the constitutional provision and thus A.R.S. § 38-298 had no application to the office of Judge of the Superior Court. The Supreme Court stated, "We hold that the Judge of the Superior Court is eligible for nomination and election to the Supreme Court and the office he now holds is not vacated . . ."

[5] 332 P.2d 887 (Ariz. 1958).
[6] 85 Ariz. 44, 330 P.2d 1003 (1958). See also CONSTITUTIONAL LAW, *supra*.

Rotation of Names of Candidates on Voting Machines

The necessity for rotation of names on voting machines was adjudicated in *Kautenburger v. Jackson*.[7] Jackson sought to enjoin the Board of Supervisors from using voting machines unless provision was made for the rotation of names of candidates in compliance with A.R.S. § 16-533, which provides for alternating the names of candidates on paper ballots. However, subsection (C) of A.R.S. § 16-533 states that the statute shall not apply where voting machines are used. In addition A.R.S. § 16-796 contains the provision that where voting machines are used the names of the candidates shall be in alphabetical order. The lower court declared A.R.S. § 16-796 unconstitutional and directed that the names be rotated on the machines. The Supreme Court affirmed the trial court, saying that is a known fact that where there are many candidates for the same office the names appearing at the head of the list have an advantage. Further, the legislature recognized this by providing that rotation of names be made on paper ballots.

[7] 333 P.2d 293 (Ariz. 1958). See also CONSTITUTIONAL LAW, *supra*.

Notes

JUDGES — DISQUALIFICATION OF FOR BIAS AND PREJUDICE

A new dimension was added to the law of Arizona on the subject of disqualifying a judge for bias and prejudice by the decision of the Supreme Court in *Hendrickson v. Superior Court.*[1] It was there indicated that an affidavit of bias and prejudice, made after a mistrial had been declared for failure of a jury to agree, might still not be too late.

It has been previously held that such an affidavit, made pursuant to the provisions of A.R.S. § 12-409, when timely filed, operates as a peremptory challenge to the judge.[2] From the moment of filing onward, he can perform no other function except to order trial before another judge.[3] It is the seasonable affidavit itself, in proper form, which disqualifies him, not the truth thereof, and so it may not be disputed.[4]

While the statute allows a litigant much leeway in bringing about the disqualification of a judge, its purpose is not to afford him an opportunity to do so to avoid the effect of an adverse ruling that has been made against him. There is no express provision, however, as to when the affidavit shall be filed. It has accordingly been said that merely requesting or consenting to continuances,[5] or the entry of various *ex parte* orders in the administration of an estate,[6] do not constitute a waiver of this absolute right. But an affidavit of prejudice is not timely made if filed after the court has ruled on any litigated or contested matter whatever.[7] It is too late if filed after the court has heard evidence and ruled on a motion for a temporary injunction;[8] or after a motion for an order for alimony, attorney's fees and costs has been heard and denied and the depositions of two witnesses taken;[9] or when the case has been

[1] 85 Ariz. 10, 330 P.2d 507 (1958). Also noted in COURTS AND PROCEDURE, *supra.*
[2] Mosher v. Wayland, 62 Ariz. 498, 158 P.2d 654 (1945); Conkling v. Crosby, 29 Ariz. 60, 239 Pac. 506 (1925).
[3] Murray v. Thomas, 80 Ariz. 378, 298 P.2d 795 (1956); Mosher v. Wayland, 62 Ariz. 498, 158 P.2d 654 (1945); Stephens v. Stephens, 17 Ariz. 306, 152 Pac. 164 (1915).
[4] Conkling v. Crosby, 29 Ariz. 60, 239 P. 506 (1925); Stephens v. Stephens, 17 Ariz. 306, 152 Pac. 164 (1915).
[5] Stephens v. Stephens, 17 Ariz. 306, 152 Pac. 164 (1915).
[6] Murray v. Thomas, 80 Ariz. 378, 298 P.2d 795 (1956).
[7] Arizona Conference Corp. v. Barry, 72 Ariz. 74, 231 P.2d 426 (1951).
[8] *Ibid.*
[9] Allan v. Allan, 21 Ariz. 70, 185 Pac. 539 (1919).

tried and judgment need only be rendered;[10] or when judgment on the pleadings has been granted.[11]

However, after the trial has begun, the right of a judge to preside further in the case may be contested at any time by any interested party who can prove the actual *fact* of bias, hostility or ill will of the judge of such a character as would prevent impartial justice being done, and this is so regardless of whether or not an affidavit of bias has been filed in accordance with the statute.[12]

A writ of prohibition has been named as the proper remedy to prevent a judge from disqualifying himself simply for the reason that an untimely request, based on information and belief, has been filed against him, where he has already ruled on contested matters and where he has not, in fact been known to be biased or prejudiced.[13]

In *Hendrickson* the petitioner, who was attempting to probate an alleged holographic will, sought a writ of prohibition to prevent the presiding judge from continuing in the will contest. A jury had failed to agree on an earlier trial of the cause, and there were pending before the judge two petitions for the appointment of special administrators, neither of which were urged by the petitioner herein, when she filed a motion for a change of judge. This motion was supported by her affidavit which stated that "because of matters and facts of which affiant was not aware at the start of said trial",[14] she had cause to believe and did believe that the judge was biased and prejudiced, as a result of which she could not obtain a fair and impartial retrial of the issues in the case. No challenge was made to the truth of this affidavit, and the respondent judge decided as a matter of law that it was of no force and effect because not timely filed.

In issuing the peremptory writ of prohibition, the Supreme Court held that when the disqualifying facts are unknown until after the expiration of the time within which the affidavit should normally be presented, the application for a change of judge is still timely if made upon the discovery of such facts. It pointed out, moreover, that such an affidavit as this one may be questioned, and if this be done, the fact of hostility and subsequent discovery thereof must be determined at a hearing. But until it is so challenged, either by the judge or by the opposing party, it must be considered as prima facie true and timely filed.

Lawrence W. Galligan

[10] Conkling v. Crosby, 29 Ariz. 60, 239 Pac. 506 (1925).
[11] Mosher v. Wayland, 62 Ariz. 498, 158 P.2d 654 (1945).
[12] Conkling v. Crosby, 29 Ariz. 60, 239 Pac. 506 (1925).
[13] Arizona Conference Corp. v. Barry, 72 Ariz. 74, 231 P.2d 426 (1951).
[14] Hendrickson v. Superior Court, 85 Ariz. 10, 330 P.2d 507 (1958).

TORTS — ATTRACTIVE NUISANCE DOCTRINE — ATTRACTION AS ELEMENT OF

MacNeil v. Perkins,[1] involved the taking of dynamite caps from the mining property of defendants by the plaintiffs, three boys ranging in age from eleven to sixteen years. The children were severely injured by the explosion of the caps after their removal from the property of defendants. The boys had gone onto the property to hunt, and while thereon, decided to take the caps which were kept in a small powder magazine. The door of the storage facility was allowed to remain ajar. It was not contended by plaintiffs that they were attracted onto defendants' property by the magazine or its contents but they admitted that the thought of taking the caps was conceived some time after the original entry. The Court held, in an unanimous opinion, that recovery by plaintiffs was sustainable under the attractive nuisance doctrine.

Although the case presents several interesting facets of the law relative to attractive nuisance, this note will be restricted to a consideration of that part of the holding dealing with whether the dangerous instrumentality need attract the child on defendant's land at the first moment of trespass to give rise to the application of the doctrine. Special attention will be given the antecedent pronouncements by the Arizona Supreme Court on this phase of attractive nuisance law.

In the first dynamite blasting cap case in Arizona,[2] it was held that a child on the premises of defendant by the latter's permission could recover for injuries sustained from the explosion of a blasting cap found on such premises. There was no requirement enunciated requiring the dangerous agency or condition to be the initial attracting force. To the contrary, the child found the cap perchance while gathering wood.

It was in *Salt River Valley Water Users' Ass'n v. Compton*[3] that the following was said in denying application of the doctrine:

> Regardless of what the respective decisions may hold as to what does or does not constitute an attractive nuisance, there is practical unanimity in them that no matter how attractive an object may be, unless it was the attraction of that particular object which lured

[1] 84 Ariz. 74, 324 P.2d 211 (1958). See also TORTS, *supra*.
[2] Southwest Cotton Co. v. Clements, 25 Ariz. 124, 213 Pac. 1005 reh. den., 25 Ariz. 169, 215 Pac. 156 (1923).
[3] 39 Ariz. 491, 8 P.2d 249 reh. 39 Ariz. 282, 11 P.2d 839 (1942).

> the child to its injury, the doctrine can have no application, and even though an attractive nuisance may exist on the premises of a landowner, if the real lure was not such nuisance, but something else, there can be no recovery in case of injury.

It is difficult to know precisely what the Court meant in that case. The opinion is susceptible of two interpretations. First, it may have meant that the dangerous instrumentality must itself have been the original attraction onto the premises, or secondly, it perhaps was intended that the dangerous instrumentality must have been the attraction without regard to the original purpose of the child in going on defendant's land. In other words, under the first interpretation, the child could not have discovered the alluring device after having trespassed but the original trespass would have to be occasioned by an attraction to the dangerous object. Under the second interpretation, it would be unimportant what caused the initial trespass, so long as there was an enticement to the hazardous object or condition at some time before injury.

But in the *Compton* case, *supra,* the attraction was a bird's nest atop an electrical power line pole. Such object was naturally created and in itself harmless. The danger lay in the electrical power line attached to the pole on which the nest rested. Thus, in this bird's nest case, the ultimate cause of the injury was not the attracting device. From a technical point of view it could not be said that the power line attracted the child. Recovery could be denied the injured child in applying either of the two interpretations.

Subsequent to the *Compton* case, the issue herein discussed did not receive comment specifically until the *MacNeil* case. But in a 1935 case,[4] Section 339 of the RESTATEMENT, TORTS, was cited with approval. As will subsequently appear, this section does not require the original trespass to have occurred as a result of an attraction for the dangerous object. In 1956[5] the doctrine was help applicable to a child who had come on defendant's property to meet his father who was employed on the premises. While there he was attracted to a dangerous electrical device. Again, there was no explicit discussion of the reason for original presence on the property.

Thus the cases subsequent to the *Compton* case suggested which interpretation was correct. The *MacNeil* case settled the law relative to this point. As therein articulated it is unimportant why the child originally entered the premises so long as there was an attraction to

[4] Buckeye Irr. Co. v. Askren, 45 Ariz. 566, 46 P.2d 1068 (1935).
[5] Downs v. Sulphur Springs Valley Electric Coop., 80 Ariz. 286, 297 P.2d 339 (1956).

the perilous device some time prior to injury. In arriving at this conclusion the Court had merely to cite the Comment on Clause (a) of Section 339, RESTATEMENT, TORTS:

> It is sufficient to satisfy the conditions stated in Clause (a) that the possessor knows or should know that children are likely to trepass upon a part of the land upon which he maintains a condition which is likely to be dangerous to them because of their childish propensities to intermeddle or otherwise. Therefore, the possessor is subject to liability to children who after entering the land are attracted into dangerous intermeddling by such a condition maintained by him although they were ignorant of its existence until after they had entered the land, if he knows or should know that the place is one upon which children are likely to trespass and that the condition is one with which they are likely to meddle.

To understand the limitation placed by some courts on the application of the doctrine solely to those cases where the attraction initially caused the child's presence on defendant's land, it is important to survey the bases for the doctrine. There are essentially seven underlying theories:

> 1. One is held to have intended the harm to the trespassing child because he is presumed to have intended the proximate consequences of his act.[6]
>
> 2. Failure to take reasonable precautions for the safety of children whose presence may be anticipated amounts to wantonness for which one is liable even to a trespasser.[7]
>
> 3. A danger which children of tender years are incapable of comprehending is, as to them, a trap or hidden danger.[8]
>
> 4. *Sic Utere tuo ut alienum non laedas*—one must use his property so as not to harm others.[9]
>
> 5. One who has reason to anticipate injury to another from conditions for which he is responsible, and which he can readily avert, is under a duty, based upon considerations of humanity, to take reasonable precautions against such injury.[10]

[6] 36 A.L.R. 110, 111.
[7] Altus v. Millikin, 98 Okla. 1, 223 Pac. 851 (1924).
[8] Faylor v. Great Eastern Quick-Silver Min. Co., 45 Cal. App. 194, 184 Pac. 104 (1919).
[9] Bjock v. Tacoma, 76 Wash. 225, 135 Pac. 1005 (1913).
[10] 36 A.L.R. 119; also Berry v. St. Louis M. & S.E.R. Co., 214 Mo. 593, 114 S.W. 27 (1908); RESTATEMENT, TORTS, § 339 (1939).

6. The attractive condition constitutes an implied invitation to infants.[11] This theory has received considerable criticism because it clearly is a fiction.[12]

7. A child of tender years is not regarded as a trespasser when his presence could be reasonably anticipated.[13] This is an inadequate ground in that it does not really explain the basis for liability.

Apparently the limitation of allurement being required at the outset of the trespass is a dryly logical outgrowth of the implied-invitation theory (number 6 above).[14] This is unjustifiable since the implied-invitation theory is a mere rationalization to attach liability where justice demands but where the court doesn't wish to be accused of making law.

Under what appears to be a better basis for the attractive nuisance doctrine, namely, that the owner or occupant owes the duty to use ordinary care for the safety of children whose presence he might reasonably anticipate, the reason for the injured child's presence upon the premises is unimportant so long as it appears that the owner or occupant had reason to anticipate the presence of children.[15]

Thus, the cause of the child's presence is material only as it bears on whether his presence could be reasonably anticipated.[16]

Still, a number of courts tenaciously cling to the restrictive view that attraction following a trespass does not invoke application of the doctrine.[17] Even very recent cases voice this condition.[18]

The courts in the United States repeatedly state that the doctrine is burdensome to land possessors and should be limited in its application.[19] Yet, twentieth century ideals of humanity and awareness of social problems occasioned by increasing density of population, gainful em-

[11] See 36 A.L.R. 114 for cases.

[12] Shawnee v. Cheek, 41 Okla. 227, 137 Pac. 724 (1913); also 1 STREET, FOUNDATIONS OF LEGAL LIABILITY at 160, 161.

[13] Hardy v. Missouri & P.R. Co., 266 Fed. 860 (8th Cir. 1920).

[14] 10 A.L.R. 2d, 22, 45; Hayko v. Colorado & U. Coal Co., 77 Colo. 153, 235 Pac. 373 (1925).

[15] 38 AM. JUR., *Negligence*, § 146 at 812; this quotation is really an eptomized version of the RESTATEMENT, TORTS, § 339 (1939). Of this section Prosser has the following to say: "The Restatement of Torts has dealt with the problem in a section which is perhaps its most successful single achievement, and which has received such general acceptance that it may be regarded as a new point of departure for the modern law." PROSSER, TORTS (2d. Ed. 1955), § 76 at 440.

[16] Eaton v. R. B. George Investments, Inc., 260 S.W. 2d 587 (Tex. 1953).

[17] Matijevich v. Dolese & S. Co., 261 Ill. App. 498 (1931); LeDuc v. Detroit Edison Co., 254 Mich. 86, 235 N.W. 832 (1931); Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P.2d 785, 48 P.2d 760 (1935).

[18] Beaston v. James Julian, Inc., 120 A.2d 317 (Del. 1956); Shemper v. Cleveland, 212 Miss. 113, 51 So.2d 770, 54 So.2d 215 (1951); Goiger v. T.V.A., 168 Tenn. 96, 216 S.W.2d 739 (1949).

[19] Salt River Valley Water Users' Ass'n. v. Compton, *supra*, note 3; United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1921).

ployment of mothers, and an increasingly greater number of dangerous artificial objects on populated land would seem to promote an extension of the doctrine. While articulating this caveat of limitation, the courts will probably impose liability for maintenance of an even greater variety of objects and conditions. Arizona, in the *MacNeil* case, has shown its proclivity to do just that.

Robert G. Beshears

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